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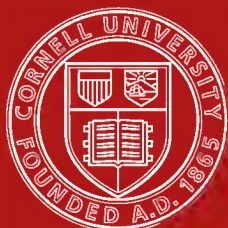
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CROWN CASES

RESERVED FOR CONSIDERATION,

AND

DECIDED BY THE JUDGES OF ENGLAND,

WITH

A SELECTION OF CASES AND NOTES OF CASES RELATING
TO INDICTABLE OFFENCES,

ARGUED AND DETERMINED IN THE

COURT OF QUEEN'S BENCH

AND

The Courts of Error.

BY

THOMAS BELL,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

FROM MICHAELMAS TERM, 1858, TO MICHAELMAS TERM, 1860.

L O N D O N :

V. & R. STEVENS & SONS; H. SWEET, AND W. MAXWELL,
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1861.

M 7145

PREFACE.



It has been thought advisable to comprise the Cases reported by the late Mr. BELL in a separate Volume.

The whole of the matter herein contained has been revised by Mr. BELL, with the exception of the last two sheets of the Cases, which have been corrected by the undersigned, who have also added an Index to the Principal Matters.

E. C. LEIGH.

L. W. CAVE.

TEMPLE,
Feb. 1861.

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ERRATA.

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38, marginal note, line 5, after "7 Wm. 4 & 1 Vict." insert "c. 89."
46, *Berry's Case*, see *Regina v. Simmons*, post, p. 168.
54, line 5, dele "you."
97, marginal note, line 18, dele "they."
208, marginal note, line 3 from bottom, for "inferior" read "better."
234, line 2, after "therefore" insert "that there is."

J. L. M
3/2/33

REPORTS

OF

CROWN CASES RESERVED.

&c. &c. &c.

L C 8 Cr Cr Cas 74

REGINA v. WILLIAM BENNETT.

1858.

THE following case was reserved by WILLES J.

William Bennett was convicted before me at the *Old Bailey* on the 18th of *August*, 1858, of the manslaughter of *Sarah Williams*.

The substantial question is whether a person who makes fireworks, contrary to the 9 & 10 *W. 3. c. 7.*, is indictable for manslaughter if death be caused by a fire breaking out amongst combustibles in his possession, collected by him, and in the course of use, for the purpose of his business, but not completely made into fireworks at the time.

The defendant was convicted of manslaughter. It appeared that the defendant was a person who made fireworks contrary to stat. 9 & 10 *Wm. 3. c. 7.* He kept a quantity of combustibles at his house for the pur-

pose of his business as a maker of fireworks; and during his absence, through the negligence of his servants, a fire broke out amongst such combustibles, and a rocket becoming thereby ignited flew across the street, and setting fire to a house opposite caused the death of a person therein.

Held, that the conviction was wrong, as the death was not occasioned by the unlawful act of the defendant, but by the negligence of his servants.

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The prisoner had a house and firework shop in the *Westminster Road*, where, for some time before the fire hereinafter mentioned, he openly carried on the business of selling fireworks. He had also a workshop at a neighbour's named *Sunter*, and a factory at *Peckham*. He had contracts to supply *Vauxhall* and *Cremorne Gardens* with fireworks, which he regularly did in considerable quantities.

He made and kept his stock of fireworks at the factory at *Peckham*. From thence he used to take the supply necessary for the Gardens daily to the house in the *Westminster Road*, where they used to be kept for two or three hours until they were taken away for use at the Gardens.

In the room of *Sunter* the smaller sort of rockets were made excepting the heads for holding stars. These heads were added at the house in the *Westminster Road*.

At the house in the *Westminster Road* fireworks were offered for sale. No fireworks were made there except as follows. First, the finishing the smaller rockets as already mentioned, and making stars for them of combustible matter. Secondly, making fireworks called serpents. Thirdly, making cases and filling them with combustible matter called red, blue and green fires. It is to this last mentioned part of the business that I ought particularly to direct attention. The fire was employed for filling coloured cases used to imitate revolving lights in fireworks called wheels. These cases affixed were not used by themselves, but in connection with those fireworks to add to their effect.

The contents of the cases of fire made at the *Westminster Road* were combustible, and the red fire would explode if struck hard. Five or six pounds of fire were made every day in the house in the *West-*

minster Road, and filled there in the back room into cases, with a rammer and mallett, by persons employed for the purpose.

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At the time of the fire there was a quantity of the red and blue fire in the house, in the room, where it was to be put into the cases, in order to be used as already mentioned in the course of the business; and a quantity of fireworks for the evening.

On *Monday*, the 12th of *July*, about six in the evening, the prisoner being out of the house and not personally interfering, a fire broke out in the red and blue fire which communicated to the fireworks, causing a rocket to cross the street and set fire to a house at the opposite side, in which the deceased *Sarah Williams* was, consequently, burnt to death.

The fire was accidental in the sense of not being wilful or designed. It did not happen through any personal interference or negligence of the prisoner; and he is entitled to the benefit of any distinction between its happening through negligence of his servants or by pure accident without any such negligence.

It was contended that there was no case against the prisoner, inasmuch as the cases of red &c. fire were only parts of fireworks and not within the statute; and that it did not appear that it was by reason of making fireworks the mischief happened; and that, at all events, the death of the deceased was not the direct and immediate result of any wrong or omission on the prisoner's part: and there was cited a case from the *Sessions Reports* at the *Old Bailey*, in which Mr. Baron *Alderson* is reported to have held that an indictment for manslaughter was not maintainable under such circumstances.

I, however, overruled these objections, holding that

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the prisoner was guilty of a misdemeanor in doing an act with intent to do what was forbidden by the statute, and that, as the fire was occasioned by such misdemeanor, and without it would not have taken place, or could not have been of such a character as to cause the death of the deceased which otherwise would not have taken place, a case was made out.

The question of a nuisance, independent of the statute of 9 & 10 *Wm.* 3., and the considerations arising upon it, need not be noticed, as it has been disposed of upon the facts in favour of the prisoner.

Entertaining doubts upon the above points, I request the opinion of the Judges.

The prisoner is out on bail.

This case was considered, on 13th *November* 1858, by COCKBURN C. J., WIGHTMAN J., WILLIAMS J., CHANNELL B. and WILLES J.

Martin appeared for the Crown, and *Hardinge Giffard* for the prisoner.

COCKBURN C. J.—It appears that the prisoner kept in his house a quantity of fireworks, but that circumstance alone did not cause the fire by which the death was occasioned; but, the fireworks and the combustibles kept by the defendant for the purpose of his business being in the house, the fire was caused by the negligence of the defendant's servants. Can it be contended that, under such circumstances, the defendant is criminally responsible?

Martin, for the Crown.—The explosive nature of these substances kept by the defendant in such a place is to be considered; and, if the keeping of the fireworks was unlawful, the prisoner would be responsible for all the consequences of that unlawful act.

COCKBURN C. J.—The keeping of the fireworks in the house by the defendant caused the death only by the superaddition of the negligence of some one else. By the negligence of the defendant's servants the fireworks ignited, and the house in which the deceased was set on fire and death ensued. The keeping of the fireworks may be a nuisance, and if, from the unlawful act of the defendant, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death: *plus* that act of the defendant, there was the negligence of the defendant's servants.

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WILLES J.—The fire which caused the death did not happen through any personal interference or negligence of the defendant. The keeping of the fireworks in the house was disconnected with the negligence of the defendant's servants which caused the fire.

COCKBURN C. J.—The view which we all take of the case is, that the prisoner cannot be convicted upon these facts.

Hardinge Giffard, for the prisoner, was not called upon by the Court.

Conviction quashed.

Cox & Saunders v. CV.

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REGINA v. WILLIAM BUTCHER.

The defendant was convicted of obtaining money by false pretences.

The 1st count of the indictment alleged that the defendant pretended to *J. H.* that he (the defendant) was the agent of *J. B.*, and was sent to the pay-table of a certain Company to receive certain monies then payable by the said

THE following case was reserved and stated by the Chairman of the *Kent* Sessions.

At the General Quarter Sessions of Peace for the county of *Kent*, holden at *Saint Augustine's* near *Canterbury*, on the 6th day of *April* 1858, *William Butcher* was tried upon the following indictment.

Kent, to wit.] The jurors for our lady the Queen on their oath present that *William Butcher* on the twenty-second day of *January* in the year of our Lord one thousand eight hundred and fifty-eight unlawfully knowingly and designedly did falsely pretend to one *James Holden* the treasurer and servant of a certain incorporated Company called *The Company of Free Fishers and Dredgers of Whitstable* in the said county that he the said *William Butcher* was the agent of two

Company to the said *J. B.*, and that he was authorized to receive such monies for and on behalf of the said *J. B.*, by means of which said false pretences the defendant obtained from *J. H.* certain monies of the said Company.

The 2nd count alleged that the defendant pretended to *A.* that he (the defendant) was authorized to send him, the said *A.*, to the said pay-table to get the pay-table money of the said *J. B.*, by means of which said false pretence the defendant obtained from the said *J. H.* and from the said *A.* certain monies of the monies of the said Company.

The 3rd count was not material to the decision of this case.

The 4th count alleged that the defendant pretended to the said *A.* that he (the defendant) was the agent of *J. B.*, and that he (the defendant) was sent by the said *J. B.* to the said pay-table to receive certain monies then payable by the said Company to the said *J. B.*, and that he (the defendant) was authorized to receive such monies for and on behalf of the said *J. B.*, by means of which said false pretences the defendant obtained from *A.* certain monies of the monies of *A.*

On the trial it was proved that the defendant promised *A.* a penny to go to the pay-table and fetch *J. B.*'s money; that *A.* accordingly went to the pay-table where the said *J. H.* was, and asked for, and received from *J. H.*, *J. B.*'s pay-table money, which he afterwards gave to the defendant because he had promised him a penny; and it was also proved that *J. H.* would not have parted with the money if *A.* had not said he was sent for it, and if he had not believed that *A.* was authorized by *J. B.* to receive it.

Held:—1. That *A.* being the innocent agent of the defendant this amounted to a false pretence, by the defendant himself, that *A.* was authorized to receive *J. B.*'s pay-table money; but

2. That the conviction could not be sustained, because there was no count in the indictment charging that as the false pretence on which the money was obtained.

persons named *James Butcher* the elder and *James Butcher* the younger of *Whitstable* aforesaid which two persons were commonly known by the name of "the *Jim Butchers*" and that he the said *William Butcher* was then sent by the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" to the pay-table of *The Company of Free Fishers and Dredgers of Whitstable* aforesaid to receive certain monies then payable by the said Company to the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" and that he was then authorized to receive such monies for and on behalf of the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" by means of which said false pretence the said *William Butcher* did then unlawfully obtain from the said *James Holden* the sum of two pounds and three shillings of the monies of the said Company with intent thereby then to defraud, whereas in truth and in fact the said *William Butcher* was not then the agent of the said *James Butcher* the elder and *James Butcher* the younger or either of them and was not then or at any other time sent by the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" or by either of them to the pay-table of *The Company of Free Fishers and Dredgers of Whitstable* aforesaid to receive certain monies or any money payable by the said Company to the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" or to either of them and the said *William Butcher* was not then authorized to receive such monies or any money for and on behalf of the said *James Butcher* the elder and *James Butcher* the younger otherwise "the two *Jim Butchers*" or either of them as he the said *William Butcher* well knew, against the form of the statute in

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BUTCHER'S jurors aforesaid upon their oath aforesaid do further
Case. present that *William Butcher* on the twenty-second day
of *January* in the year of our Lord one thousand eight
hundred and fifty-eight unlawfully knowingly and de-
signedly did falsely pretend to one *William Butler* that
he the said *William Butcher* was authorized to send him
the said *William Butler* to the pay-table of the said Com-
pany of Free Fishers and Dredgers of *Whitstable* to
get the pay-table money of the aforesaid *James Butcher*
the elder and *James Butcher* the younger otherwise
“the two *Jim Butchers*” by means of which said false
pretence the said *William Butcher* did then unlawfully
obtain from the said *James Holden* then being the
treasurer of *The Company of Free Fishers and Dredgers*
of Whitstable as aforesaid and from the said *William*
Butler the sum of two pounds three shillings of the
monies of the said Company with intent thereby then
to defraud, whereas in truth and in fact the said
William Butcher was not then nor at any other time
authorized to send the said *William Butler* to the said
pay-table of the said Company of Free Fishers and
Dredgers of *Whitstable* to get the pay-table money or
any other money of the said *James Butcher* the elder
and *James Butcher* the younger otherwise “the two *Jim*
Butchers” as he the said *William Butcher* at the time he
so falsely pretended well knew, against the form of the
statute in such case made and provided. 4th count.
And the jurors aforesaid upon their oath aforesaid do
further present that on the twenty-second day of
January in the year of our Lord one thousand eight
hundred and fifty-eight the said *William Butcher*
knowingly did falsely pretend to the said *William*
Butler that he the said *William Butcher* was the agent
of the said *James Butcher* the elder and the said *James*
Butcher the younger commonly known by the name of

“the *Jim Butchers*” and that he the said *William Butcher* was then sent by the said *James Butcher* the elder and the said *James Butcher* the younger otherwise “the two *Jim Butchers*” to the pay-table of the Company aforesaid to receive certain monies then payable by the said Company to the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” and that he was then authorized to receive such monies for and on behalf of the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” by means of which said false pretences the said *William Butcher* did then unlawfully obtain from the said *William Butler* the sum of two pounds three shillings of the monies of the said *William Butler* with intent to defraud, whereas in truth and in fact the said *William Butcher* was not the agent of the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” or either of them and whereas in truth and in fact the said *William Butcher* was not then or at any other time sent by the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” or either of them to the pay-table of the said Company to receive certain monies then payable by the said Company to the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” or any money whatsoever and whereas in truth and in fact he was not then authorized to receive such monies or any money whatsoever for or on behalf of the said *James Butcher* the elder and *James Butcher* the younger otherwise “the two *Jim Butchers*” as he the said *William Butcher* well knew, against the form of the statute in such case made and provided.

There was a third count in the indictment, which

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was abandoned at the trial by the counsel for the prosecution.

The substance of the evidence for the prosecution was as follows.

John Hammond Nicholls stated: that he was foreman of *The Incorporated Company of Free Fishers and Dredgers of Whitstable*; that the affairs of the Company are managed by the foreman and jury and by a treasurer; that the members of the Company are called freemen and are employed under the supervision of the foreman in working upon the oyster grounds of the Company, and are paid for their work by the treasurer; and that the treasurer of the Company is *James Holden*; and that the witness and *James Holden* met at a public house in *Whitstable Street*, called *The Duke of Cumberland*, on *Friday* the 22nd *January* 1858, at the pay-table, for the purpose of paying the freemen for their work; that the defendant *William Butcher* is a freeman of the Company and was then entitled to receive, and came to the pay-table and did receive, his pay of 14*s.* between 5 and 6 o'clock in the evening of the said 22nd *January*; that amongst the freemen of the said Company are two persons, father and son, of the name of *James Butcher*, who go by the name of "the two *Jim Butchers*," and the money which becomes due to them is commonly called "the two *Jim Butchers'* money;" that between 6 and 7 o'clock of the same *Friday* evening a little boy came to the pay-table, after the defendant *William Butcher* had received his money, and said, "I want the two *Jim Butchers'* money;" that the sum of 2*l.* 3*s.* was due to the two *James Butchers*; that witness told *Holden* the treasurer to pay the 2*l.* 3*s.*, and witness saw *Holden* pay the money to the boy; that the freemen frequently send their boys and girls for their money;

that afterwards *James Butcher* the father came, and then *James Butcher* the son came, for their money.

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William Butler, a boy ten years of age, stated: that he knew the defendant *William Butcher*; that he (the witness) and another boy were playing together in the street of *Whitstable*, on *Friday* the 22nd *January* last, near *The Duke of Cumberland* public house; that the defendant came to them and said, "Which of you boys wants to earn a penny?" that witness replied, "I do;" that the defendant then said to witness "Go to the pay-table and fetch the two *Jim Butchers'* money;" that witness accordingly went to the pay-table of *The Duke of Cumberland* public house, where *Mr. Nicholls* and *Mr. Holden* were, and asked for the two *Jim Butchers'* pay-table money; that he received 2l. 3s., and went back to the street where the defendant was waiting and gave him the money, and received from him a penny. On cross-examination, witness said he went and received the money, and afterwards gave it to the defendant, because he had promised him the penny for doing so.

James Holden stated: that he was treasurer of the Company; that on *Friday*, the 22nd *January*, he was at the pay-table with *John Hammond Nicholls* the foreman of the Company; that a little boy, the witness last examined, came and asked for the two *Jim Butchers'* pay-table money; that he paid 2l. 3s. to the boy; that the money so paid to the boy was the money of the Company; that he parted with the money because the boy came and said he wanted the two *Jim Butchers'* money, and that he should not have parted with it without that; *Nicholls* the foreman goes on the oyster grounds, knows what work has been done by the freemen, and what each has earned and is to receive; that *Nicholls* specified the amount and told him what he was to pay, and that

1858. he should not have parted with the money if the little
BUTCHER'S boy had not said he was sent for it, and if he had not
Case. believed that the boy was authorized by the two *Jim Butchers* to receive it.

The defendant's name was never mentioned in the transaction.

James Butcher, the father, and *James Butcher*, the son, respectively, proved that they were commonly known as the two *Jim Butchers*; that they did not authorize either the defendant *William Butcher*, or the boy *William Butler*, to receive their money from the Company, and did not send any one for it on the said *Friday* evening.

It did not appear that either the foreman or the treasurer of the Company knew the name of the little boy, or who he was, at the time the treasurer paid him the money.

On the part of the defendant it was contended that the defendant was entitled to be acquitted on the following grounds. First, because the conduct of the defendant did not amount to the making of any false pretence at all to any one. And secondly, as to the false pretence alleged in the first and second counts in the indictment, that they were not substantiated by the evidence, inasmuch as, even if the evidence was to the effect that the defendant pretended to the boy *Butler* that he, the defendant, was authorized to receive the two *Jim Butchers'* money, such pretence was not the false pretence communicated to *Holden*, and by means of which the money was obtained, but that the impression on the mind of *Holden* made by the application of *Butler* was, according to *Holden's* evidence, that *Butler* had been authorized by the two *Jim Butchers* to receive their money, being a pretence essentially different from that laid in the first and second counts. With respect to the second count in

the indictment, it was also submitted that the money, when obtained from *Butler*, was not in his hands as the agent of the Company, the property in it having been parted with by the treasurer when paid to him; and it could not therefore be held that the money obtained from *Butler* was the property of the Company as laid in that count, and that therefore it was not proved that the prisoner obtained from *James Holden* and from *William Butler* any money the property of the Company.

In addition to this, it was contended that the second count charged an obtaining from *James Holden* and *William Butler* jointly, and that such obtaining was disproved by the evidence.

With respect both to the second and fourth counts, it was urged that the evidence shewed that the money was not obtained from the boy by any false pretence at all, but by the promise of the penny. And with respect to the fourth count, it was urged, in addition, that the monies there mentioned to have been obtained were not, as against the prisoner, the property of *William Butler*. On the part of the prosecution, it was contended that the boy *Butler* was the innocent agent of the defendant; that the false pretence made through the medium of the boy was the act of the defendant; that the boy was the mere mouthpiece of the defendant; that what the boy said was in point of law said by the defendant himself, just the same as if he had been personally present in the room saying what the boy said; and that the evidence supported the first and also the second and fourth counts of the indictment. I stated to the jury that, if they were of opinion that the defendant was guilty of obtaining money by false pretences upon the facts proved, the question of law would be reserved for the decision of the Court of Criminal Appeal.

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BUTCHER'S
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1858. The jury found the defendant guilty. The judgment was respited, and the defendant was admitted to bail to appear and receive sentence at the next Court of Quarter Sessions.

BUTCHER'S
Case.

The question for the opinion of the Court of Criminal Appeal is, Whether the facts proved are sufficient to support either the first, second or fourth count of the indictment.

This case was argued, on the 13th *November* 1858, before COCKBURN C. J., WIGHTMAN J., WILLIAMS J., CHANNELL B. and WILLES J.

C. G. Addison (*G. Francis* with him) appeared for the Crown; no counsel appeared for the defendant.

C. G. Addison for the Crown.—When the defendant took it upon himself to send the boy for the money, he, by his conduct, represented that he, the defendant, was authorized by the two *Butchers* to receive their money. A representation or pretence may be made by the conduct and acts of a party as well as by express words. Where a person at *Oxford*, not being a member of the University, went to a shop for the purposes of fraud, wearing a commoner's cap and gown, and obtained goods, this was held a sufficient false pretence to satisfy the statute, though nothing passed in words; *Rex v. Barnard* (a). The pretence made by the boy, the innocent agent of the defendant, was, in truth, the pretence of the defendant himself, and it is submitted that in criminal as well as in civil pleading the transaction may be described either as it appeared at the time, or as, in truth, it really was. Where a female of the name of *Davis* assumed the name of *Johnson* for a fraudulent purpose, it was held that she might be indicted according to the apparent state of facts in her assumed name of *Johnson* or in

her real name of *Davis*; *Norton's Case* (a). In civil cases, if an undisclosed principal obtains property through the medium of an agent as the apparent purchaser, you may proceed either according to the actual or the apparent state of facts. You may charge the principal, though you knew him not, and dealt with his agent believing him to be a principal, and you may describe the principal in pleading as doing and saying exactly what his agent did and said. There is no variance if the description accords with the real truth of the matter. A party not present at the time of the making a false pretence may be convicted as a principal if he assisted in the fraud; *Moland's Case* (b). In the *American* cases on false pretences it is laid down that if *A.* procures *B.* to go to *C.* with a false pretence to obtain the goods of *C.*, *A.* is guilty in the matter of obtaining these goods by false pretences, and whether *A.* be outside or within the door of the shop is immaterial. All that is necessary to be proved is that he is, at the time, aiding in putting forth the false pretences; *The Commonwealth v. Harley* (c), *The Commonwealth v. Call* (d).

COCKBURN C. J.—I am inclined to agree with you in thinking that the conduct of the defendant amounted to a false representation; but it was a false representation to this effect, it was as if he had gone to the payable himself, taking the boy with him, and said, “this boy is authorized to receive the *Jim Butchers'* money.”

WILLIAMS J.—Is there not a count alleging a false pretence to the boy, and an obtaining of the money by the defendant from the treasurer by means of that false pretence?

Addison.—The second count alleges that the defendant pretended to the boy that he was authorized to

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(a) Russ. & Ry. 510.

(b) 2 Mood. C. C. 276.

(c) 7 Metcalf, 462.

(d) 21 Pickering, 515.

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send the boy to the pay-table for the *Jim Butchers'* money, and that, by means of that false pretence, he obtained the money from the treasurer; and it is submitted that this count is supported by the evidence. By the very act of sending the boy for the money, the defendant represented to the boy that he had authority from the *Butchers* to send him.

COCKBURN C. J.—There is no pretence to the boy. The boy went because he was promised a penny. Nothing operated upon the mind of the boy but the expectation of the penny.

Addison.—That was not the sole inducement to the boy. The boy went and got the money and gave it to the defendant both because he was promised the penny and because he was induced to think that the defendant had a right to send him for the money. The boy would not have gone if he had known the real truth of the matter, and that he was doing a wrong thing, and helping the defendant wrongfully to obtain another person's money. There is then the fourth count which alleges that the defendant falsely pretended to the boy that he was authorized to receive the *Butchers'* money, and that by means of that false pretence he obtained the money from the boy.

WILLES J.—There was no obtaining of the money from the boy by any false pretence. The boy was the mere agent of the defendant, and received the money as the defendant's agent.

Addison.—I venture to submit that he could not lawfully be his agent for any such purpose. He had no power to make him his agent for the receipt of this money. The money was not the defendant's money when it reached the hands of the boy, but it continued the property of the Company. There was in truth a larceny of the money by the defendant, the treasurer having no authority from the Company to

part with the property in the money to any other parties than those to whom he was authorized to pay it, and who were entitled to receive it. In this respect the case is like *Wilkin's Case* (a), where a hosier entrusted property to his servant to be given to *H.*, and the prisoner went to the servant and pretended to be *H.* and got the goods; and, like *Robin's Case* (b), where a bailee of wheat deposited it in a warehouse under the care of his servant with authority to deliver it only to the owner or his managing clerk, and the prisoner obtained it from the servant by means of false representations. Wherever a servant has authority only to deliver property to a particular individual, and another person obtains it from such servant by falsely representing himself to be authorized to receive it, this is larceny, for the servant has no authority to part with it but to the right person; *Rex v. Longstreath* (c). And by 7 & 8 *Geo. 4. c. 29. s. 53.* if, upon the trial of any person for obtaining money by false pretences, it be proved that he obtained the property in such manner as to amount to larceny, he is not by reason thereof entitled to be acquitted.

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WIGHTMAN J.—You need not trouble yourself upon that point.

Addison.—The simple question is, was there not a fraud practised on the boy throughout in making him believe he was doing a right and lawful thing at the bidding of the defendant, when it was in truth wrong and unlawful? And did not some one or other of the false pretences charged in the indictment operate upon the mind of the boy as well as the promise of the penny?

COCKBURN C. J.—The false pretence here is a pretence that the boy was sent by the *Butchers* for their

(a) 1 Leach. C. C., 4th ed., 520,
case 236; 2 East, P. C. 673.

(b) 1 Dears. C. C. 418.
(c) 1 Mood. C. C. 137.

1858. money, and was authorized to receive it; and you must lay the real false pretence—that by which the money was obtained. No doubt the prisoner is responsible for an act done by the instrumentality of his innocent agent; but there is no count to meet the pretence.

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Addison.—The money was in truth obtained by means of the false pretence charged in the first count, although the treasurer did not know it at the time. The defendant was all the while standing outside the door of the house playing off the false pretence through the medium of the boy. The treasurer thought it was the boy who was seeking to get the money for the *Butchers*, when in truth it was the defendant himself behind the scene.

COCKBURN C. J.—This case, when it comes to be considered, does not appear to me to present any real difficulty. The prisoner was, no doubt, guilty of obtaining the money by false pretences; but it is also clear to me that the pretence by which the money was in fact obtained was that the boy had authority to receive it, and that is not one of the pretences laid in the indictment. The prisoner is responsible for the representation made by the boy as his innocent agent; but that does not meet the difficulty I feel on the ground that the pretence is not correctly stated. You must in the indictment truly allege the false pretence by which the money was obtained. The prisoner told the boy to go to the pay-table and fetch the two *Jim Butchers'* money; and the boy went to the pay-table and said, "I am come for the two *Jim Butchers'* money." The prisoner, no doubt, is as much responsible for what the boy said as if he, the prisoner, had gone to the pay-table and made the false representation himself; but the representation of the boy was that he, the boy, had authority to receive the

money. There is no such representation alleged in the indictment, and that was the representation on which the treasurer parted with the money. There is no count to fit the facts, and the conviction must be quashed. I may mention that my brother *Willes* is of the same opinion (a).

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WIGHTMAN J.—I am clearly of the same opinion. The law has been correctly stated by Mr. *Addison*; but, on the ground pointed out by the Lord Chief Justice, I think the conviction cannot be sustained.

WILLIAMS J.—I am of the same opinion. There was sufficient evidence to go to the jury to support a conviction on the ground that the prisoner was guilty of making the false pretence by which the money was obtained, namely that the boy *Butler* was sent for the *Jim Butchers'* money; but there was no count in the indictment laying that as the false pretence. One of the counts charges that the money was obtained from the boy *Butler* by a false pretence; but, in fact, what induced him to go and get the money, and afterwards to hand it to the defendant, was the promise of the defendant to give him a penny.

At one time I thought that *Regina v. Brown* (b), where it was said by *Patteson* J. that there was nothing in the Act of Parliament which made it necessary that the pretence should be made to the person from whom the money was obtained, if it was made to operate on his mind, might have supported the second count, which avers that the defendant made the pretence to the boy, and thereby obtained the money from the treasurer; but the pretence which the prisoner made to the boy did not operate on the mind of the treasurer; the pretence that operated on his mind was that he, *the boy*, was authorized to receive the

(a) *Willes* J. had left the Court.

(b) 2 Cox C. C. 348.

1858. money, and not the pretence of the defendant that
 BUTCHER'S *he* was sent for it or was authorized to receive it.
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CHANNELL B.—I also think this conviction cannot be sustained. There is no count in the indictment to fit the case.

Conviction quashed.

1858. REGINA *v.* ELIZABETH HILTON AND
 JOSEPH M'EVIN.

It is no objection to an indictment for felony that a previous conviction is stated at the beginning and not, as is more usual, at the end of the indictment; and the proper course when an indictment is so framed is to state the new charge to the jury in the first instance, and then, if they return a verdict of guilty, to charge them to inquire as to the fact of the previous conviction.

THE following case was reserved by the Recorder of the Borough of *Hastings*.

At the Quarter Sessions of the Peace, holden for the Borough of *Hastings* on the 29th of *October* 1858, *Elizabeth Hilton* and *Joseph M'Evin* were tried (with *William Robert Hilton*, who was acquitted,) on an indictment in the following words:—

Borough of *Hastings* } The jurors for our lady the
 to wit. } Queen upon their oaths present that heretofore to wit at the General Sessions of the delivery of the Queen's gaol at *Newgate* holden for the jurisdiction of the Central Criminal Court at Justice Hall in the *Old Bailey* in the suburbs of the city of *London* on the 6th day of *July* in the year of our Lord 1857 before certain Justices of our said lady the Queen assigned to deliver the said gaol at *Newgate* of the prisoners therein being *William Robert Hilton*

Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing.

The Court will not send a case back for amendment on the mere application of counsel; but will do so if on the argument it appears that it is imperfectly stated.

by the name of *William Henrick* was then and there convicted of felony and which said conviction is still in full force strength and effect and not in the least reversed annulled or made void. And the jurors aforesaid upon their oaths aforesaid do further present that heretofore to wit at the General Sessions of the delivery of the Queen's gaol at *Newgate* holden for the jurisdiction of the Central Criminal Court at Justice Hall in the *Old Bailey* in the suburbs of the city of *London* on *Monday* the 27th day of *October* in the year of our Lord 1856 before certain Justices of our said lady the Queen assigned to deliver the said gaol of *Newgate* of the prisoners therein being *Elizabeth Hilton* by the name of *Elizabeth Mantrick* was then and there convicted of felony and which said conviction is still in full force strength and effect and not in the least reversed annulled or made void. And the jurors aforesaid on their oaths aforesaid do further present that the said *William Robert Hilton* late of the parish of the *Holy Trinity* in the borough of *Hastings* labourer being so convicted of felony as aforesaid the said *Elizabeth Hilton* late of the parish of the *Holy Trinity* in the said borough of *Hastings* single woman being so convicted of felony as aforesaid and *Joseph M'Ewin* late of the said parish of the *Holy Trinity* in the borough of *Hastings* aforesaid on the 23rd day of *August* in the year of our Lord 1858 with force and arms at the parish aforesaid in the borough aforesaid and within the jurisdiction of the Court of General Quarter Sessions of the Peace of our said lady the Queen within the said borough one purse containing several pieces of the Queen's current silver coin of the realm together of the value of twelve shillings of the moneys goods and chattels of one *John Goddard* from the person of *Sarah Goddard* his wife then and there feloniously did steal take and carry away, against the

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form of the statute in that case made and provided and against the peace of our lady the Queen her Crown and dignity.

2nd count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *William Robert Hilton* so being convicted of felony as aforesaid the said *Elizabeth Hilton* so being convicted of felony as aforesaid and the said *Joseph M'Evin* on the said 23rd day of *August* in the year of our Lord 1858 with force and arms at the parish last aforesaid in the borough aforesaid and within the jurisdiction last aforesaid one purse containing several pieces of the Queen's current silver coin of the realm together of the value of twelve shillings of the moneys goods and chattels of one *John Goddard* then lately before feloniously stolen taken and carried away feloniously did receive and have they the said *William Robert Hilton*, *Elizabeth Hilton* and *Joseph M'Evin* respectively then and there well knowing the said moneys goods and chattels to have been feloniously stolen taken and carried away, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

At the request of the counsel for the prisoners, and to prevent the prejudice against them likely to arise from the part of the indictment charging the former convictions being read in the hearing of the jury in the first instance, the prisoners were arraigned on those parts of the indictment only which charged subsequent offences, it being intended to postpone their arraignment on their former convictions until the jury should have delivered their verdict on the subsequent offences.

The jury found *Elizabeth Hilton* guilty of stealing, and *Joseph M'Evin* guilty of receiving, the goods and moneys mentioned in the indictment. Upon this the

prisoner *Elizabeth Hilton* was about to be arraigned on that part of the indictment charging a former conviction, when Mr. *Ribton*, counsel for the prisoners, objected, contending that this was an irregular course and could not be pursued. But the gentleman who appeared for the prosecution desiring, together with Mr. *Ribton*, that the matter should be reserved for the opinion of the Court for Consideration of Crown Cases Reserved, I overruled the objection. The prisoner *Elizabeth Hilton* having been arraigned on the former conviction, to which she pleaded not guilty, the jury were then duly charged to inquire into the former conviction, and found that the said *Elizabeth Hilton* had been before convicted as alleged in the indictment. Mr. *Ribton* then moved in arrest of judgment, on the ground of the foregoing alleged irregularity, and also by reason of the indictment alleging that the former conviction "is still in full force, strength and effect, and not in the least reversed, annulled or made void," whereas by the expiry of the sentence such conviction had become vacated.

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As to *Joseph M'Evin*, Mr. *Ribton* requested me to direct the jury that *Joseph M'Evin* could not be convicted of receiving on the facts hereinafter stated. On the occasion in question *Elizabeth Hilton* was walking by the side of the prosecutrix, and *Joseph M'Evin* was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and on looking round saw *Elizabeth Hilton* behind her walking with *Joseph M'Evin* in the opposite direction, and saw her hand something to *Joseph M'Evin*.

I directed the jury that, if they did not think from the evidence that *Joseph M'Evin* was participating in the actual theft, it was open to them on these facts to find a verdict of receiving.

I respite judgment on the prisoners in order that

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the judgment of the Court for Consideration of Crown Cases Reserved might be ascertained on a case to be stated, and the foregoing is the statement of facts on which the judgment of the Court is requested. The prisoners were committed to gaol to abide the said judgment.

William Wakeford Attree,
Recorder of *Hastings*.

This case was set down for argument on the 13th *November* 1858, before COCKBURN C. J., WIGHTMAN J., WILLIAMS J., CHANNELL B. and HILL J.

Ribton appeared for the prisoners, and applied that the case might be sent back to the learned Recorder, in order that the evidence given on the trial might be more fully set out.

COCKBURN C. J.—The Court will not send a case back on such an application ; but will do so when it appears to the Court on the argument that it is imperfectly stated.

The case was argued, on 22nd *November* 1858, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., CHANNELL B. and HILL J.

Hurst appeared for the Crown, and *Ribton* for the prisoners.

Ribton, for the prisoners.—The indictment is bad and the judgment ought to be arrested. The count contains an introductory allegation that the prisoners have been previously convicted of felony. The object of the Legislature in the recent statutes has been to prevent the jury from being prejudiced by the former conviction being stated to them; *Regina v. Key* (a), *Regina v. Shuttleworth* (b).

WIGHTMAN J.—Is your objection that the allegation

(a) 2 Den. C. C: 347.

(b) *Ibid.* 351.

of the previous conviction ought not to be at the beginning of the indictment but at the end ?

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Ribton.—Yes. I say it ought to be in a separate count. If it is, as here, made part of the charge, it must be put to the jury in the first instance, and thus the prejudice will be created which it has been the object of the Legislature to avoid. It is impossible to give the prisoner in charge to the jury without reading the previous conviction.

HILL J.—No. It is not impossible, and in this case it was not done.

Ribton.—After the prisoner was convicted of the principal charge the first count was exhausted, and there could not be a further inquiry respecting the previous conviction. The averment of the previous conviction is part of the count, and does not, as is usual, follow it in the indictment.

POLLOCK C. B.—There is nothing in this objection.

Ribton.—The second objection is, that the prisoner *M'Evin* ought not on the evidence to have been convicted of receiving. The evidence shewed that if he was guilty at all it was of stealing, and so the Recorder ought to have directed the jury. The prisoner was aiding and abetting: he was present and near enough to afford assistance.

WILLIAMS J.—To constitute a principal in the second degree there must be a common purpose.

POLLOCK C. B.—If the Recorder had taken a different course you would have had a better objection.

Ribton.—In *Regina v. Perkins* (a) it was held that a principal in the second degree *particeps criminis* cannot be treated as a receiver.

POLLOCK C. B.—It was there stated as a fact that the prisoner was a principal. The jury have negatived that in this case.

(a) 2 Den. C. C. 459.

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Case.*Hurst*, for the Crown, was not called upon.

POLLOCK C. B.—There is no ground for either of these objections. As to the objection to the indictment, it is a matter of perfect indifference whether the previous conviction is stated at the beginning or at the end of the indictment. As to the second objection, the learned Recorder told the jury that if they did not think from the evidence that *M'Evin* was participating in the actual theft, it was open to them on the facts to find a verdict of guilty on the count for receiving. That direction substantially is that, if the jury should think the taking the purse was the common act of the two prisoners, they might convict *M'Evin* of stealing; but if they did not think that he was participating in the actual theft they might find him guilty of receiving. If the jury had found a common purpose, no doubt the stealing would have been the act of both; but they did not so find; and I think the direction of the learned Recorder was quite right.

WIGHTMAN J.—I am entirely of the same opinion. It can make no difference whether the statement of a former conviction is at the commencement of an indictment or at the end. As to the other objection, the question was expressly and properly left to the jury.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. DARIUS CHRISTOPHER.

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THE following case was reserved by the Deputy Chairman of the *Dorset* Quarter Sessions.

At the General Quarter Sessions of the Peace for the county of *Dorset*, holden at *Dorchester* on the 19th of *October* 1858, *Darius Christopher* was tried before me and other justices of the peace on the following indictment.

Dorsetshire } The jurors for our Sovereign lady the
to wit. } Queen upon their oath present that
heretofore to wit at the General Sessions of the Peace
of our lady the Queen held at *Dorchester* in and for
the county of *Dorset* on *Tuesday* the twenty-ninth day
of *November* in the year 1854 one *Darius Christopher*
was then and there convicted of felony.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *Darius Christopher* being so convicted of felony as aforesaid afterwards to wit on the thirteenth day of *October* in the year 1858 at the parish of *Stinsford* in the county of *Dorset* four pounds in money and two purses of the goods and chattels of one *Jane Lovell* feloniously did steal and carry away, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

Where a person finds lost property and appropriates it to his own use, it is necessary, in order to convict him of larceny, that the jury should find that at the time he took possession of the property he knew or had the means of knowing who the owner was, and took possession of it with the felonious intent to appropriate it to his own use. Therefore where on a trial for larceny, under such circumstances, the Chairman told the jury that a felonious intent was a necessary ingre-

dient in every larceny, but that such intention was to be judged of by acts subsequent as well as immediate, and that if they thought the conversion of the property by the prisoner to his own use without inquiry was proved, and that though there was no name or mark upon it, there was such peculiarity about it as to warrant inquiry, and above all if they were satisfied that the prisoner subsequently heard that the property was lost and cried by the public crier, and then did not take measures to make restitution, they might infer felonious intention; it was held that such direction was defective, inasmuch as it was consistent therewith that the jury should find the prisoner guilty, although they were of opinion that the felonious intent did not exist at the time of finding.

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3rd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *Darius Christopher* being so convicted of felony as in the first count of this indictment mentioned afterwards to wit on the said thirteenth day of *October* in the year 1858 at the parish of *Stinsford* aforesaid in the county of *Dorset* aforesaid four pounds in money and two purses of the goods and chattels of the said *Jane Lovell* before then feloniously stolen and carried away feloniously did receive he the said *Darius Christopher* then well knowing the said goods and chattels last aforesaid to have been feloniously stolen and carried away, against the form of the statutes in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

It appeared from the evidence that the prosecutrix left her master's house between 11 and 12 o'clock in the morning of the 13th *October* to go to *Dorchester* (a distance of about a mile), having in her possession a purse of green leather (commonly called a *portemonnaie*) containing within it another smaller purse, about the size of a half crown, in which there were three sovereigns and two half sovereigns. In the public path between *Stinsford House* and the first meadow, as she supposes, she dropped the purse; but thinking she might have left it on her table, she went on and returned home about 1. Finding out her loss she went in the afternoon to *Dorchester* and had the property cried by the public crier,—describing it as a green leather purse and a smaller one inside, and that they contained three sovereigns and one half sovereign and a half crown, or 3*l.* 12*s.* 6*d.* (This was an error, as it really contained, as she found afterwards, two half sovereigns instead of only one, 4*l.* 2*s.* 6*d.*).

About 4 o'clock the prisoner is at the *Bull's Head*

public house with a man named *Upshall*, whom he treats to beer, and paid for it with a sovereign which he took out of a purse. Whilst they were sitting at the table together in the tap, the crier came by and cried something. The landlady, *Mary Jane Russell*, went to the door to hear; *Upshall* asked her what it was cried. Landlady, from the passage, said, "Some money lost, 3*l.* 12*s.* 6*d.*" Prisoner was taken up eventually at 12 o'clock at night at another public house, and the two purses with six half sovereigns, two shillings and sixpence in silver and some pence found on him. The constable said: "These things were lost." Prisoner said: "Well, I know I did pick them up." Constable said: "There was more money than this." Prisoner said: "I know I've done wrong."

On the part of the prisoner, it was contended that at the time he took the purse (which was admitted) he had no felonious intent; that there was no name or special mark on the purse or the money, and that the subsequent appropriation did not amount to larceny; that, though civilly, he was not criminally liable; and the cases of *Regina v. Mole (a)*, *Thurborn's Case (b)* and *Regina v. Lathin (c)* were cited.

In summing up, I told the jury that a felonious intent was held to be a necessary ingredient in every larceny, but that intention was to be judged of by acts subsequent as well as immediate; that if they thought the conversion of the money to his own use without inquiry was proved, and that there was, though no name or mark on the purse yet such peculiarity in it, as containing a second smaller one, as to warrant some inquiry, and, above all, if they were satisfied that the prisoner, when sitting in the public

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Case.

(a) 1 Car. & K. 417.

(b) 1 Den. C. C. 392.

(c) This appears to be an error,

and probably the case referred to was *Regina v. Preston*, 2 Den. C. C.

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house, heard the words of the landlady, which *Upshall* said he heard, and then did not take measures to make restitution, that I thought they might infer felonious intention and find him guilty.

The jury returned a verdict of guilty on the count for stealing.

A previous conviction was then proved and the prisoner was sentenced to six calendar months hard labour.

On application of counsel for the prisoner, a case was granted and execution of the judgment respited till the decision of the Court above was known.

I respectfully submit the question, whether the above facts warranted in point of law the finding of the jury in this case.

Charles Porcher,
Deputy Chairman of the Quarter Sessions.

This case was argued, on the 22nd *November* 1858, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., CHANNELL B. and HILL J.

Stock appeared for the Crown, and *Ffooks* for the prisoner.

Ffooks, for the prisoner.—The facts in this case are identical with those in *Regina v. Thurborn* (a); and the object of the Court below, in reserving it, seems to have been to procure a review of that decision.

POLLOCK C. B.—The question for us is, whether there was any evidence to go to the jury that, at the moment when the prisoner took up the purse, he intended feloniously to appropriate it.

Ffooks.—There was not any whatever. The purse was lying on a public footpath, and had evidently been lost. There was no name on it, and nothing about it or its contents to indicate the ownership. The cir-

cumstance that the purse contained a smaller one cannot, of course, alter the character of the first taking, although, certainly, it might have facilitated the discovery of the person who had lost it. This very case is put by Lord *Hale* (a), and mentioned in *Regina v. Thurborn* (b): "If *A.* find the purse of *B.* in the highway and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony." But *Regina v. Thurborn* does not stand alone; it has been frequently recognised and acted upon. In *Regina v. Preston* (c) Lord CAMPBELL strongly expresses his approval of it.

CHANNELL B.—And in *Regina v. Dixon* (d) also it is acted upon. The observations of Lord CAMPBELL in *Regina v. Preston* are very important as they shew what the direction to the jury ought to be.

Ffooks.—The direction of the Chairman here was to the effect that subsequent conduct might convert an innocent taking into a felonious appropriation. That was clearly wrong.

The learned counsel was stopped by the Court.

Stock, for the Crown.—The present case is distinguishable from the cases cited. In *Regina v. Preston* the jury did not say that there was a felonious intention at the time of finding, and in that case the Recorder had misdirected the jury in telling them to consider at what time the prisoner first resolved to appropriate the note to his own use; and that if they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found when he first resolved to appropriate the note, then he was guilty of larceny; and the Court held that direction was wrong, because it was

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(a) 1 Hale P. C. 506.

(c) 2 Den. C. C. 353.

(b) 1 Den. C. C. 392.

(d) Dears. C. C. 580.

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consistent with an honest possession on the part of the prisoner.

The facts in this case differ from those in *Regina v. Thurborn*, and the jury here substantially find that the prisoner, though believing at the time of finding that the owner could be found, did intend feloniously to appropriate the purse and its contents to his own use.

WILLIAMS J.—You have this difficulty to grapple, that there is no evidence of that except the subsequent conduct of the prisoner.

Stock.—I submit that the nature of the property found, one purse within another, and the place where it was found, on a footpath near a market town, afford reason for believing that the owner could be found.

POLLOCK C. B.—If you examine all and each of the facts, they are consistent with the innocence of the prisoner. Is there any evidence from which the jury ought reasonably to have found a verdict of guilty?

CHANNELL B.—In *Regina v. Dixon (a)*, in which *Regina v. Thurborn* was referred to, it was held that, if a man find lost property and keep it, and at the time of finding it have no means—no *immediate* means, of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use.

POLLOCK C. B.—I am of opinion that this conviction cannot be sustained. We are bound by the authority of *Regina v. Thurborn*. It is necessary to bring home to the prisoner a felonious intention at the time of finding.

WIGHTMAN J.—The decision in *Regina v. Thurborn* has been recognised in several subsequent decisions. We cannot overrule that case and are bound by it.

WILLIAMS J.—Though considering myself bound by

the authority of *Regina v. Thurborn*, and agreeing as I do with the decision in that case, I must confess I have never been able to agree with some of the principles there laid down. Here the direction to the jury was, I think, calculated to mislead them and to induce them to suppose that, although the prisoner had no felonious intent at the time of finding, yet if he subsequently had such intent he was guilty of larceny; but that is not the law. The evidence here shews, according to my view of it, that the prisoner found the purse and took possession of it as a finder, and that the wicked intention of appropriating it came upon him afterwards. I therefore think this conviction cannot be sustained.

CHANNELL B.—I think that the case of *Regina v. Thurborn* was rightly decided; and I think that the cases of *Regina v. Preston* and *Regina v. Dixon*, which followed, laid down a reasonable rule and one consistent with the decision in *Regina v. Thurborn*.

The question is, was there a felonious intent at the time when the prisoner first took possession of the purse? I am by no means prepared to say that evidence of what subsequently occurred was not admissible to prove a felonious intention at the time of finding, but the question of intent at that time was not put to the jury. The Chairman told the jury that a felonious intent was held to be a necessary ingredient in every larceny, but that intention was to be judged of by acts subsequent as well as immediate; and that, if they were satisfied that the prisoner when sitting in the public-house heard the words of the landlady, and then did not take measures to make restitution, they might infer a felonious intention. Now it is quite consistent with that direction that the jury should find the prisoner guilty, although they were of opinion that the felonious intent did not arise until subsequently

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to the finding. I therefore think that the conviction cannot be sustained.

HILL J.—Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shewn that, at the time of finding, he had the felonious intent to appropriate the thing to his own use; and this is founded on the rule laid down by Lord *Coke*, and referred to and acted upon in *Regina v. Thurborn*. The other ingredient necessary is that, at the time of finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found,—there must be the *immediate* means of finding him. In this case the evidence fails in both these particulars, and therefore the conviction cannot be sustained.

Conviction quashed.

1859.

REGINA v. SAMUEL ROBINSON.

Dogs, not being the subject of larceny, are not "chattels" within the meaning of section 53 of 7 & 8 Geo. 4. c. 29.

The following case was reserved by the Recorder of *Liverpool*.

The prosecutor, who resided at *Hartlepool*, was the owner of two dogs, which he advertised for sale. The prisoner, *Samuel Robinson*, having seen the advertisement, made application to the prosecutor to have the dogs sent to him at *Liverpool* on trial, falsely pretending that he was a person who kept a man-servant. By this pretence the prosecutor was induced to send

the dogs to *Liverpool*, and the prisoner there obtained possession of them with intent to defraud, and sold them for his own benefit. The dogs were Pointers, useful for the pursuit of game, and of the value of 5*l.* each.

At the *Liverpool* Borough Sessions, holden in *December* 1858, the prisoner was indicted, convicted and sentenced to seven years penal servitude, under the statute 7 & 8 *Geo.* 4. *c.* 29. *s.* 53.

On behalf of the prisoner a question was reserved and is now submitted for the consideration of the Justices of either bench and Barons of the Exchequer, viz., whether the said dogs were chattels within the meaning of the said section of the statute, and whether the prisoner was rightly convicted.

The prisoner remains in *Liverpool* Borough Gaol under the sentence passed at Sessions.

Gilbert Henderson,

Recorder of *Liverpool*.

1859.

ROBINSON'S
Case.

This case was argued, on 29th *January* 1859, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

Brett appeared for the Crown, and *Littler* for the prisoner.

Littler, for the prisoner.—A dog is not “a chattel” within the meaning of the statute. At common law no larceny could be committed of a dog. It is laid down (*Lambard's Eirenarcha*, 267) that “it is felonie to steale any the moveable goods of any person; but because it may in some cases bee doubted whether the things so taken are to be numbered amongst moveable goods or no I will proceed in particularitie”—then he says, “to take dogges of any kind, apes, parats, singing birds or such like, though they be in the house, is no felonie;” and *Dalton* adds (*Country*

1859. *Justice*, 372): "No, not by taking a blood-hound or mastiff, although there is good use of them, and that a man may be said to have a property in them so as an action of trespass lieth for taking them." And by statute it is not to this day made larceny to steal a dog, but is a misdemeanor only (10 *Geo.* 3. c. 18., 7 & 8 *Geo.* 4. c. 29. s. 31., 8 & 9 *Vict.* c. 47.). And, by section 31 of the very same statute under which the prisoner has been convicted, the *stealing* of a dog is made punishable by fine only, and by a three months imprisonment in default; and yet, if the intention of the Legislature were that section 53 should be applicable to dogs, the obtaining a dog by *false pretences* would involve, as in this case, seven years penal servitude. But this section is applicable solely to the obtaining of such articles by false pretences as might be either at common law or by previous statute the subject-matter of an indictment for larceny, if the facts were such as would support it. The preamble to the section says: "Whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud, for remedy, &c.;" and the clause concludes with this proviso: "Provided that if upon the trial of any person-indicted for such misdemeanor it shall be proved that he obtained the property in question in such a way as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, and no such indictment shall be removable by certiorari, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." From this it is clear that the Legislature throughout looks at the probability and actually provides for the objection being raised that the facts amount to larceny.

The present Dog Stealing Act, 8 & 9 *Vict.* c. 47.,

by section 1, repeals the provisions of 7 & 8 *Geo.* 4. c. 29. so far as it relates to dog stealing; and, by section 2, enacts that to steal a dog shall be a misdemeanor, for which the offender shall be liable, on summary conviction, to imprisonment and hard labour not exceeding six months: and the same statute enacts that a second offence shall be an indictable misdemeanor.

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Brett, for the Crown.—It cannot be disputed that for some purposes dogs are chattels. They are chattels which pass to the executor, and for which trover will lie; 1 *Williams on Executors, Com. Dig. Action sur Trover, Ireland v. Higgins (a)*, *Wright v. Ramscot (b)*, *The Case of Swans (c)*; but it is said they are not chattels within this section, because they are not the subject of larceny at common law. The statute relating to false pretences was passed to provide a remedy in cases of cheating. The reason which is assigned why dogs should not be the subject of larceny at common law is, not that they were not always considered to be chattels, but because “they are of so base a nature that a man shall not die for them;” but death never was the punishment for cheating; and, therefore, the reason why dog stealing should not be a larceny does not apply. Words sufficiently large to include this offence are introduced into 38 *Hen.* 8. c. 1., 30 *Geo.* 2. c. 24. s. 1, and also into the statute now under consideration.

Lord CAMPBELL C. J.—It is clear that dog stealing was not felony at common law; the reason why it was not is immaterial.

Brett.—Assuming that dogs are not the subject of larceny, they may well be within the section in question. They are within the words of the section, and

(a) Cro. Eliz. 125.

(b) 1 Wms. Saund. 83.

(c) 7 Rep. 15 b.

1859. there is no reason why the words should not have their full effect.

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Lord CAMPBELL C. J.—It is admitted that dog-stealing is not larceny at common law, and a specific punishment of a milder character has been enacted by the later statute, which makes the offence a misdemeanor. That being so, it would be monstrous to say that obtaining a dog by false pretences comes within the statute 7 & 8 *Geo. 4. c. 29. s. 53.*, by which the offender is liable to seven years penal servitude. My brother *Coleridge* used to say that no indictment would lie under that section unless, if the facts justified it, the prisoner could be indicted for larceny, and that is now my opinion.

MARTIN B.—I think this conviction cannot be sustained. The question is one entirely of the construction of the statute.

WILLES J.—From the Year Books downwards, including the case of *Swans (a)*, dogs have always been held not to be the subject of larceny at common law.

The other learned Judges concurred.

Conviction quashed.

(a) 7 Rep. 15 b.

1858.

REGINA v. AARON LYONS.

It is a felony,
under 14 & 15
Vict. c. 19.

s. 8., coupled

with 7 *Wm. 4 & 1 Vict. s. 3.*, for a man to set fire to his own goods in his own house with intent, by burning the goods, to defraud an insurance Company. Where, therefore, an indictment charged that *A. L.* "feloniously, &c., set fire to certain goods and chattels of him the said *A. L.*, to wit &c., then being in a certain building, to wit a certain house situate, &c., and then in the possession and occupation of the said *A. L.*, with the intent in so doing to defraud the said insurance Company known by the name of &c., against the form of the statute &c., and against the peace &c.," it was held sufficient.

THE following case was reserved at the Summer Assizes for the county of *Salop* by BYLES J.

The prisoner was indicted for setting fire, in a house in his own occupation, to his own goods, consisting of furniture and stock in trade, with intent to defraud an insurance office.

1858.

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Case.

The goods, according to the evidence, had been insured against fire, and were in the prisoner's own house, no part of which house was burnt.

It was objected that the setting fire to the prisoner's own goods in his own house, though with intent to defraud the insurance office by burning the goods, was not felony at common law: that the prisoner could only be convicted, if at all, under the 14 & 15 *Vict. c. 19. s. 8.*, which enacts that if any person shall maliciously set fire to any goods being in a building, the setting fire to which building is made felony by statute, he shall be guilty of felony: that the setting fire to a man's own house being no offence at common law, the only statute which makes it a felony is the 7 *Wm. 4 & 1 Vict. c. 89. s. 3.*, whereby it is enacted that whosoever shall maliciously set fire to any house, &c., whether the same shall be in the possession of the offender or of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony: that the setting fire to a man's own house with intent to defraud, not by burning the house, but by burning the goods therein, was not made felony by the last mentioned statute.

The jury found the prisoner guilty of maliciously setting fire to his own goods in his own house, with intent, by burning the goods, to defraud the insurance office.

I reserved the question whether the act so found amounted to a felony; but sentenced the prisoner to years penal servitude, on which sentence he is still in custody.

J. BARNARD BYLES.

1858.

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Case.

This case was argued, on 20th *November* 1858, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., BYLES J. and HILL J.

Scotland appeared for the Crown, and *Cook Evans* for the prisoner.

Cook Evans, for the prisoner.—I contend that the prisoner is not guilty of a felony either at common law or by statute. Arson is thus defined in 1 *Hale P. C.* 566: “The felony of arson or wilful burning of houses, is described by my Lord *Coke*, cap. 15, p. 66, to be the malicious and voluntary burning the house of *another* by night or by day;” and we find the same definition in *Hawkins* and in *East’s Pleas of the Crown*. In 4 *Black.*, ch. 16, it is said: “Arson, *ab ardendo*, is the malicious and wilful burning of the house or outhouse of *another man*.”

In *Rex v. Pedley (a)* Lord *Mansfield* says: “The law is now established and settled that if a tenant set fire to the house of his landlord he is not guilty of arson. The legal definition of this crime is burning the house of *another*; and it was lately determined in *Breeme’s Case (b)*, by the unanimous opinion of nine Judges, that it is not felony to burn a house of which the offender is in possession by virtue of a lease for years” It is necessary in considering the subsequent statutes to bear in mind that this was the state of the law which those statutes were intended to remedy. It was first made felony for a man to set fire to a house in his own occupation by stat. 43 *Geo. 3. c. 58.*: and that statute and all the other statutes relating to the subject, and there are several of them, point to an intent to defraud by the act of setting fire to the house or building, and not by burning goods or chattels; and were intended to meet the mischief created by the decisions to which I have referred.

(a) 1 Leach C. C., case 122, p. 242, 4th edition.

(b) 1 Leach C. C., case 109, p. 220, 4th edition.

BYLES J.—The question in this case turns on the meaning of the word “thereby” in section 3 of 7 Wm. 4 & 1 Vict. c. 89 (a).

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Cook Evans.—Setting fire to the house *simpliciter* is not made felony by that section. To constitute the felony, the setting fire to the house must be with intent *thereby* (that is by setting fire to the house) to injure or defraud some person. I contend that, if the prisoner had been indicted for setting fire to the house “with intent to defraud by burning the goods therein,” he could not have been convicted under this section, inasmuch as the intent to injure or defraud to which the section points is the intent to do so by burning the house and not by burning the goods.

BYLES J.—In the case of a man setting fire to his house with intent to defraud by burning his goods therein, would not the setting fire to the house be an event in the chain of causation?

Cook Evans.—“Thereby” means “by that act.” The result must be the direct, immediate and necessary consequence of the act as distinguished from the possible and probable consequence.

WIGHTMAN J.—Suppose a man set on fire his goods in his house, the goods not insured, the house not insured, but some person was in the house, and the house was perfectly untouched by the fire, would he be guilty of a felony?

Cook Evans.—I submit that that would not come

(a) That section enacts, “That whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of *England and Ireland*, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill,

malt-house, hop-oast, barn or granary, or to any building or erection used in carrying on any trade or manufacture or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender or in the possession of any other person, with intent *thereby* to injure or defraud any person, shall be guilty of felony.”

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Case.

within the second or any other section of the 7 *Wm.* 4 & 1 *Vict.* c. 89.

Section 8 of the 14 & 15 *Vict.* c. 19., on which the other side will rely, creates an entirely new class of offences, and was intended for the protection of buildings of an entirely different character to those referred to in the 7 *Wm.* 4 & 1 *Vict.* c. 89.; and the term "buildings," in the latter clause of section 8 (*a*) of 14 & 15 *Vict.* c. 19., must be understood to mean buildings *ejusdem generis* with the classes enumerated in the first branch of the section, and does not include a house occupied as this was.

Mr. *Greaves*, in his edition of Lord *Campbell's* Acts, in a note to this section says:—"The latter part of this section is intended to meet all those cases where persons, intending to set fire to buildings, actually set fire to some matter or other in such buildings, but fail, through some cause or other, in actually setting fire to such buildings themselves." Having been the person entrusted with the preparation of this statute, Mr. *Greaves's* opinion is worthy of consideration, and if his view be the correct one the prisoner is not guilty of an offence within that section.

POLLOCK C. B.—The Court entertains a doubt whether the indictment sufficiently charges the offence. Is there any count to bring the case within the two statutes?

Scotland, for the Crown.—There are several counts in the indictment, but the one upon which the prisoner

(*a*) That section enacts that "If any person shall wilfully and maliciously set fire to any station, engine-house, warehouse or other building belonging or appertaining to any railway, dock, canal or other navigation, every such person shall be guilty of felony."

The punishment of such offenders

is provided for, and the section then proceeds:—"And if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony."

was found guilty alleged that he “feloniously, wilfully and maliciously set fire to certain goods and chattels of him the said *Aaron Lyons*, to wit, one straw mattress, 1000 lucifer matches, &c., then being in a certain building, to wit a certain house situate at the parish aforesaid in the county aforesaid, and then in the possession and occupation of the said *Aaron Lyons*, with the intent in so doing to defraud the said insurance Company, called and known by the name of *The Shropshire and North Wales Assurance Company*, against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.” That count, I submit, clearly brings the offence within the statutes.

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Case.

WILLIAMS J.—The statute seems to have been worded somewhat hastily. You say that setting fire to goods in any house which is the subject of arson would be sufficient; adopting that construction there is nothing in the statute which requires the intent to defraud to be alleged.

Scotland.—I say that if instead of the goods the defendant had set fire to the house with intent thereby to burn the goods and defraud the insurance Company, that would have been a felony under section 3 of 7 *Wm. 4* & 1 *Vict. c. 89.*; and, therefore, that the goods in this case were in a building the setting fire to which would have been a felony within that statute, and consequently that the prisoner has been properly convicted of the offence of arson under the statute 14 & 15 *Vict. c. 19. s. 8.*

WIGHTMAN J.—Putting to you the same question I put to Mr. *Evans*, supposing a man set fire to his own goods in his own house, the goods not insured, the house not insured, but some person was in the house, and the house was perfectly untouched by the fire?

Scotland.—There, if the house were a dwelling-house, the setting fire to it would be a felony within

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section 2 of 7 *Wm.* 4 & 1 *Vict. c.* 89.; and the setting fire to goods in such a house would be an offence within the terms of section 8 of 14 & 15 *Vict. c.* 19.

WILLIAMS J.—Is there any Act which makes the setting fire to a building *simpliciter* a felony?

Cook *Evans*.—Yes. The 12 *Geo.* 3. *c.* 24. *s.* 1. made the wilfully setting fire to any of his Majesty's ships of war, arsenals, magazines or dock yards, or any buildings erected therein or belonging thereto, or any place where any ammunition of war or stores are kept, felony.

WILLIAMS J.—Is that an unrepealed Act?

Cook *Evans*.—It is.

Scotland.—However that may be, here the jury have found the intent to defraud; and the setting fire to the house with the intent to burn the goods and so defraud the Company would have been a felony

BYLES J.—The doubtful question at the trial was whether the word “thereby” in the 7 *Wm.* 4 & 1 *Vict. c.* 89. *s.* 3. ought not to be read in a literal sense.

Scotland.—I say that “thereby” means nothing more than “by means of.” To hold the contrary would lead to serious consequences.

The word building is not confined to the class referred to in 14 & 15 *Vict. c.* 15., but extends to houses mentioned in section 3 of 7 *Wm.* 4 & 1 *Vict. c.* 89.

Cook *Evans*, in reply.—Whatever the consequences may be, we must not strain the words of the Legislature to meet a particular case. The 8th section of the 14 & 15 *Vict. c.* 15. was only intended to apply to cases where the intent was to defraud by burning the house or building; and, even if the offence intended to be charged is really an offence within the statute, the facts and circumstances necessary to constitute that offence are not sufficiently alleged in the indictment.

POLLOCK C. B.—We are all of opinion that this conviction must be affirmed. The objection raised by Mr. *Evans* is that with respect to the 8th clause of 14 & 15 *Vict. c. 19.*:—"And if any person shall wilfully and maliciously set fire to any goods or chattels being in any building the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony"—it applies only to the case where the setting fire to the house *per se* is an offence; and we are referred to a statute, 12 *Geo. 3. c. 24.*, which makes it an offence to set fire to certain public buildings; and it is urged that we therefore ought not to connect the statute on which the indictment is framed with the statute 7 *Wm. 4 & 1 Vict. c. 89. s. 3.* so as to assist this indictment, and that we cannot so connect them without importing something that the Legislature has not expressed; but we are all of opinion that the objection cannot prevail.

It is likely that a hundred years ago such an objection might have succeeded. Statutes were then required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the Legislature. Now, under the statute referred to by the prisoner's counsel, the simply setting fire to a building would not be a felony. It would be necessary in the indictment to add the words "wilfully and maliciously," which are not in the statute 14 & 15 *Vict. c. 19.* To make it an offence the setting fire to a house must be wilful and malicious, or there must be some one in the house, or it must be done with intent to injure or defraud. Under the statute 14 & 15 *Vict. c. 19.*, we think

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the offence is complete if there be a setting fire to the goods under such circumstances as, if shewn with respect to a house set on fire, would render the setting fire to the house a felony. Here the intent to defraud is alleged with respect to the goods. The setting fire to the house with the like intent would be a felony. We think that the offence is sufficiently stated in the count referred to, and that the case is brought within the two Acts of Parliament.

The other learned Judges concurred.

Conviction affirmed.

1859.

REGINA v. JAMES BERRY.

A summons was issued by a justice of the peace, under 7 & 8 Vict. c. 101.

THE following case was reserved by HILL J.

At the Winter Assizes, 1858, for *Liverpool*, James Berry was tried before me for perjury.

and 8 Vict. c. 10., on the application of the mother of a bastard child against the putative father, more than twelve months after the birth of such child. The summons stated that the mother alleged that the defendant had paid money for the maintenance of the child within twelve months after its birth, but did not state that she had "upon proof" applied; and it appeared in fact that no such proof had been given except the statement of the mother (not upon oath) to the justice. The putative father appeared at the Petty Sessions, according to the exigency of the summons, and made no objection to the proceedings; and the case, on the hearing at such Petty Session, was gone into upon the merits, when he swore that he had not paid any money for the maintenance of the child. He was thereupon indicted for perjury and convicted.

Held, by Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.: 1. That a proceeding under the above statutes against the putative father of a bastard child is not a proceeding *in panam*, but is in the nature of a *civil* suit. 2. That evidence of the payment of money by the putative father within the twelve months was material on the hearing of the summons.

Held, by Lord CAMPBELL C. J., CROWDER J., WILLES J. and WATSON B. (MARTIN B. *dissentiente*), that, assuming that there ought to have been evidence on oath of the payment of money by the putative father within the twelve months before the issuing of the summons, the defendant had submitted to the jurisdiction of the Petty Sessions, and waived and cured the want of such evidence, which was a mere irregularity in procedure.

Held, by MARTIN B., that the jurisdiction of the justice to issue the summons was a special jurisdiction; that to create it there must be *proof on oath* as a condition precedent, and that no subsequent appearance could cure the want of such proof; the distinction being between a Court of general jurisdiction and a special one, and not between proceedings of a civil and criminal nature.

The perjury was alleged to have been committed upon the hearing of a summons, a copy of which is as follows.

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BERRY'S
Case.

"To *James Berry*, of *Worsley*, in the county of *Lancaster*, gamekeeper.

"County of *Lancaster*, } Whereas application hath
Petty Sessional Division } been this day made to me,
of *Manchester*, to wit. } the undersigned, one of her
Majesty's justices of the peace for the county of
Lancaster, by *Martha Humphreys*, single woman,
residing at *Eccles*, in the Petty Sessional Division of
Manchester, in the said county of *Lancaster*, for which
I act, who hath been delivered of a bastard child since
the passing of the Act of the eighth year of the reign
of her present Majesty, intituled "An Act for the
further amendment of the laws relating to the Poor
in *England*," and more than twelve calendar months
from the date hereof, and of which bastard child she
alleges you to be the father, and that you have paid
money for its maintenance within twelve months after
its birth, for a summons to be served upon you to
appear at a petty Session of the Peace, according to the
form of the statute in such case made and provided.

"These are therefore to require you to appear at the Petty Sessions of the justices holden at the Court-house in *Worsley* in the said county of *Lancaster*, being the Petty Sessions for the Division of *Manchester*, in which I usually act, on *Wednesday* the 17th day of *November* instant, at one of the clock in the afternoon, to answer any complaint which she shall then and there make against you touching the premises.

"Herein fail not. Given under my hand at the Court-house in *Worsley* aforesaid this third day of *November* in the year of our Lord 1858.

"*H. L. Trafford.*

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“*Note.*—If you neglect to appear at the Petty Sessions as above stated, the justices, upon proof that this summons has been duly served upon you or left at your place of abode, may proceed, if they think fit, to make an order upon you, as the putative father of the child above referred to, to pay a weekly sum to the said mother for its maintenance, and other sums for costs and expences.”

When the summons came on to be heard, *James Berry* appeared personally in answer thereto; he was also assisted by an attorney; no objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits before the stipendiary magistrate, who heard the same. Upon the hearing of the summons *Martha Humphreys* proved that she had lodged at Mrs. *Sutcliff*'s house in *Salford* for eleven months before the birth of the child (*April 12, 1856*); that *James Berry* had visited her there constantly; that *James Berry* was the father of the child; that *James Berry* visited her constantly at the same place after the birth of the child, and paid her money; that on the day after the birth of the child *James Berry* paid her 1*l.* 7*s.* 6*d.*, and that he paid her a weekly sum for several weeks after. Other evidence having been given in support of the summons, in answer thereto *James Berry* was sworn as a witness on his own behalf, and he deposed, amongst other things, “that he never paid *Martha Humphreys* any money at all on any account whatsoever;” and “that he never was in *Sutcliff*'s house in *Salford*,” meaning Mrs. *Sutcliff*'s house in which *Martha Humphreys* lodged. It was further proved upon the trial before me that the summons was issued by Mr. *Trafford* on the personal application of *Martha Humphreys*, who stated on such application, but not on oath, that she had been delivered of a bastard child more than

<p>twelve months previous, and that money had been paid by <i>James Berry</i>, the father of the child, for its maintenance within twelve months from its birth.</p>	<p>1859.</p> <hr style="width: 100%;"/> <p>BERRY'S Case.</p>
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It was objected at the trial before me, by counsel for *James Berry*, that the magistrate had no jurisdiction to hear the summons, as there had been no information in writing and no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth, and that such information and proof were requisite prior to the issuing of the summons under 7 & 8 *Vict. c. 101. s. 2.* and 8 & 9 *Vict. c. 10.* It was also objected that it was immaterial at the hearing of the summons whether moneys had been paid or not, as proof of that fact was necessary only prior to the issuing of the summons.

I stated to the jury that, if the materiality of the matter sworn were a question of law, I thought it material upon the question of paternity whether the alleged father had paid money towards the expence of the confinement and the maintenance of the child, but that I should leave the question of materiality to them with the other facts. The jury found the prisoner guilty. I postponed the sentence and reserved the objections taken by the prisoner's counsel for the judgment of the Court for the Consideration of Crown Cases.

HUGH HILL,
January 3rd, 1859.

This case was argued, on 22nd *January* 1859, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

R. Assheton Cross appeared for the Crown, and *Atkinson Serjt.* (*Wheeler* with him) for the prisoner.

Atkinson Serjt., for the prisoner.—It was objected on the trial that the payment of money for the main-

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tenance of the child *within twelve months* after the birth of such child was immaterial, and therefore perjury could not be assigned upon it: but as the case reserved finds that "the case was gone into *on the merits* before the stipendiary magistrate, who heard the same," this objection is not now open.

Lord CAMPBELL C. J.—Could it be seriously contended that proof of the payment of money by the putative father for the maintenance of the child was not material?

Atkinson Serjt.—That payment generally (as evidence corroborative of the mother) was material was not disputed; but payment within the twelve months was immaterial, as the putative father did not in fact deny the paternity on the hearing. The objection now made is that the application for the summons was not *on oath* as it ought to have been. It is conceded that such an application need neither be in writing nor on oath unless required by some statute to be so; but an oath is indisputably necessary in a case of this kind by virtue of the 7 & 8 *Vict. c. 101.* and 8 & 9 *Vict. c. 10.* Section 2 of the former statute enacts "that any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this Act, or who has been delivered of a bastard child within the period of six calendar months before the passing of this Act, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, *upon proof* that the man alleged to be the father of such child has, within the twelve months next after the birth of such child, paid money for its maintenance, make application to any one justice of the peace acting for the Petty Sessional Division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged

by her to be the father of such child; and if such application be made before the birth of the child, the woman shall make *a deposition upon oath* stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a Petty Session to be holden after the expiration of six days at least for the Petty Sessional Division, city, borough or other place in which such justice usually acts."

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Then comes the statute 8 & 9 *Vict. c. 10.*, whereby, after reciting that divers questions have been raised as to the validity of certain orders made under the previous statute, it is enacted that where proceedings are set forth according to the forms in the schedule annexed, the same shall be valid and sufficient in law. There is a schedule of forms given, and the summons in a case like this recites that the mother has given the justice *proof* that the alleged father did pay money as required by the statute. The statutes therefore require that before the summons can issue the mother must give such *proof*, and give it as a *condition precedent* to any jurisdiction in the magistrate; for the words "*upon proof*" "*make application*" can only be satisfied by proof upon oath; and, such proof not having been given, the whole of the hearing, when the perjury was alleged to be committed, was *coram non iudice* and void for want of jurisdiction.

LORD CAMPBELL C. J.—But is not this a *civil* proceeding and the irregularity, assuming it to be one, waived by the defendant appearing and making no objection?

ATKINSON Serjt.—The question of waiver is based upon the maxim *Quilibet potest renunciare juri pro se introducto* (a), and has no application to any thing except what is intended for the benefit of the indi-

(a) Broom's Max. 624, 3rd edit.

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vidual dispensing with it. Again, it has no application to a case where the individual neither in fact knows, nor has the means of knowing, what he is supposed to waive. Here the prisoner did not know, and could not by any means or process of law get to know, whether any such proof had or had not been given. The magistrate was sole judge of the facts and could not be compelled to disclose them. The wording of the summons itself was calculated to mislead the prisoner. Here the proof was not mere procedure but a *sine qua non* as to jurisdiction.

Whether it is mere procedure or a condition precedent to the magistrate's jurisdiction derives considerable light from the state of the law at the time the 7 & 8 *Vict. c. 110.* was passed.

From the time of *Elizabeth* the parish officers took the initiative and not the mother. They were obliged to give fourteen days notice to the putative father before an application at the Petty Sessions. Thus had the Legislature from the earliest poor law carefully guarded the public against any initiatory power in the mother. It is not likely that the Legislature, who had so carefully provided, would at once, without any precautionary measures, transfer such a dangerous power to the mother upon her mere statement which could never be traversed or questioned.

LORD CAMPBELL C. J.—Do you say that payment within twelve months was not a traversable fact on the hearing?

Atkinson Serjt.—Payment generally was traversable, but payment within a given time was not. As to proof on oath being necessary before the summons issues, it is to be observed that throughout all the sections of this statute (*a*) the words “testimony,” “evidence,” “proof,” “proof upon oath” (*b*) “deposi-

(*a*) See especially, ss. 7. 70.

Bac. Abr. *Evidence*; Bentham's

(*b*) See Taylor on Evid. p. 1.;

Jud. Evid. b. 1. ch. 4. 6.

tion upon oath" (a) (though strictly different in meaning) are used synonymously. If there be any difference between them, it is in favour of the prisoner; for whether the word *proof* means evidence or effect of evidence, or means to an end, or the end itself, it is the most comprehensive term used. The words *upon oath* added to *deposition* are mere verbiage, for *deposition ex vi termini* means it.

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CROWDER J.—Do you say that the proof given to the justice is conclusive? cannot be questioned?

Atkinson Serjt.—Yes. He is the sole and final judge of that fact. Both as regards the necessity of an oath and the waiver, the case of *Regina v. Scotton* (b) is directly in point. That was the case of an information to recover penalties under the 6 & 7 Wm. 4. c. 65. s. 9., which required that before any proceeding should be taken the charge contained in the information should be deposed to on the oath of some person other than the informer, and the Court of Queen's Bench held that the jurisdiction of the justices was deficient where that requirement had not been complied with; and Coleridge J., in his judgment, said, "I quite agree that this is a question of jurisdiction. Before any summons issues the charge must be deposed to on the oath of a credible witness. Here that had not been done." In that case the person charged appeared and made no objection. It is true that it was for penalties: but a bastardy order may end in distress and imprisonment; and therefore the case is a direct authority in favour of the prisoner.

A. Cross, for the Crown.—I may treat the materiality as out of the question, and I therefore contend: 1. That the proof need not be on oath unless the statute expressly requires it. 2. That an oath is not required

(a) See Webster's Dict.; 3 Bl. 100; Bentley's Case, 1 Str. 558.

(b) 13 Law J. Mag. Cas. 58.

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by this statute; and 3. That if it does require it the omission is only an error in procedure, and was waived.

Lord CAMPBELL C. J.—You may take your first proposition as acceded to ~~you~~.

A. Cross.—Then I secondly contend that an oath is not required by this statute. The statute points to three conditions under which the summons may be applied for. First, there is the application within twelve months after the birth of the child, and in that case the woman has simply to make the application for the summons, no oath or proof being necessary. Secondly, the application after twelve months from the birth of the child, and that must be “upon proof” that the alleged father has within the twelve months next after the birth of such child paid money for its maintenance. Thirdly, the application before the birth of the child, and then the woman “must make a deposition upon oath.” Thus, in the first case, there is the application *simpliciter*; in the second “proof” of payment of money is required, and nothing said about deposition upon oath; and in the third a “deposition upon oath” is made necessary; and in the forms given in the statute we find that in the first case the summons recites simply the application: in the second the form of application is headed as “the information and application” of the woman, recites that she has “given proof” of payment of money, and the application is at the foot stated to be “exhibited” before the justice, and no mention of an oath is made; while in the third case we find the application is called the “application and deposition” of the woman, and is said to be “exhibited and sworn.” In 8 & 9 *Vict. c. 10. s. 11.* the three sets of forms correspond; and I contend that the words of the second section of 7 & 8 *Vict.*, and the forms given in that and the subsequent

statute, shew that it was not intended to require an oath in a case like the present; and the word "proof" seems properly to mean anything which serves either immediately or mediately to convince the mind of the truth or falsehood of a fact or proposition (a), and does not necessarily imply proof upon oath. In *Baston v. Carew* (b) it was held that it was not necessary that any information or complaint should be made in order to justify the interference of magistrates under the 11 Geo. 2. c. 19. s. 16. There the statute did not in terms require an oath, and the Court of Queen's Bench held it to be unnecessary, acting upon the general principle of law that no oath is required unless, as *Holroyd J.* said, "specially directed by the Act of Parliament" under which the justices act. *Regina v. Millard* (c) is also an authority in my favour on this point.

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MARTIN B.—The general rule of law no doubt is, that, unless a statute requires it, an information need not be on oath, or even writing.

Cross.—Yes; and *Baston v. Carew* is a conclusive authority for that: but in this case it is important to shew that there may be an inquiry without hearing evidence on oath.

LORD CAMPBELL C. J.—If the fact must be proved on the hearing of the information, it is less material that the proof should be upon oath before the summons issues.

Cross.—Thirdly. If proof on oath is required; at all events its omission is only an error in procedure, and was waived.

The cases under the old Bastardy Acts are conclusive on this point. In *Rex v. The Justices of Wilt-*

(a) Domat, Les Lois Civiles dans leur Ordre Naturel, part 1. liv. 3. tit. 6.; Bonnier, Traité des Preuves,

s. 3.; Best on Evid. 2nd ed. 7. 8.

(b) 3 Barn. & C. 649.

(c) Dears. C. C. 166.

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shire (a) the proceedings were under the old bastardy law, which provided that no application by the parish officers against the putative father of a bastard child should be heard unless seven days notice was given, and in that case the necessary notice had not been given, but the defendant appeared at the petty sessions, did not object to the want of notice, and desired the justices to remit the charge to the Quarter Sessions, which they did; and the Court of Queen's Bench held that the defendant had precluded himself from afterwards objecting that there was a want of jurisdiction in the Petty Sessions, as he had by his own acts cured the defect. So in *Regina v. Stoddart* (b) it was held that a party who appeared at the Petty Sessions on the charge of being putative father, and desired to have his case heard at the Quarter Sessions, and entered into a recognizance reciting that he had due notice to appear at the Petty Sessions, was bound by that recital, and could not afterwards, on the hearing at the Quarter Sessions object that in fact such notice was not given; and in *Rex v. The Justices of Carnarvon* (c), although the Court seemed to think that the sessions could not entertain an application by the overseers of a parish for an order to charge the putative father of a bastard child without proof of notice to such putative father, notwithstanding his appearance in Court, it was taken for granted that it was an objection which might be cured by waiver, and *Rex v. Stone* (d) is also in my favour on this point.

Atkinson Serjt., in reply.—It is admitted that the application need not be in writing nor on oath, unless by force of a statute. But these statutes do make it a *sine qua non*. The case of *Regina v.*

(a) 12 Ad. & Ell. 793.

(b) 1 Gale & D. 654.

(c) 5 Nev. & M. 364.

(d) 1 East, 639.

Millard, if not in my favour, certainly is not against me; it decided simply that sections 24 and 30 of 8 Geo. 4. c. 30. are perfectly independent sections, not engrafted one upon the other as contended for; that section 30 did not control section 24, and that therefore an information on oath was not at all in that case necessary.

As to the cases cited on the question of waiver, one general answer applies to all, namely, that the magistrates had some jurisdiction: here the defect was antecedent in time to every scintilla of jurisdiction. The defect cannot be waived for these reasons, because the provision was not introduced for the individual's benefit but for that of the public or the mother; because the defendant did not know, nor had he the means of knowing anything of the want of jurisdiction, and because this is not really in the nature of a civil proceeding but strictly *in pœnam*, as it is not necessarily for the payment of money only, for an order might be followed by distress or imprisonment.

Cur. adv. vult.

The judgment of the Court was delivered on 29th January, 1859.

LORD CAMPBELL C. J.—This case was argued before my brothers MARTIN, CROWDER, WILLES, WATSON and myself. My brothers CROWDER, WILLES and WATSON concur in the judgment I am about to deliver.

In this case a summons was granted by a justice of peace, under 7 & 8 Vict. c. 101. and 8 Vict. c. 10., on the application of the mother of a bastard child, against the defendant as the putative father, more than twelve months having elapsed since the birth of the child, he having within the twelve months next after the birth of the child paid money for its maintenance.

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The summons was according to the form given by 8 *Vict.*, Schedule No. 6., except in saying that the mother alleged that the defendant had paid money for the maintenance of the child within twelve months after its birth, instead of saying that she had given proof of this fact. The defendant duly appeared at the Petty Sessions according to the exigency of the summons. Being assisted by an attorney, he made no objection to the form of the summons or to any of the proceedings on which the summons was founded ; but he denied the paternity, and denied that he had paid any money for the maintenance of the child within twelve months after its birth or at any other time. The case was then gone into on the merits, and proof being given of the paternity and of the payment of money by the defendant for the maintenance of the child within twelve months after its birth, the defendant presented himself as a witness on his own behalf, and, having on oath denied the paternity, swore that he had never paid any money for the maintenance of the child.

Among other assignments of perjury there was one upon the defendant's statement in his evidence that he had never paid any money for the maintenance of the child. At the trial before by brother HILL, strong evidence was given in support of this and other assignments of perjury. It was further proved that the summons was issued by the magistrate on the personal application of the mother, who then stated, but not on oath, that she had been delivered of a bastard child more than twelve months previously, and that money had been paid by *James Berry*, the father of the child, for its maintenance within twelve months from its birth.

It was then objected, by the counsel for the defendant, that he could not be indicted for perjury in

respect of what he swore at the hearing of the case at the Petty Sessions, as the summons was insufficient, and no proof on oath had been given before the magistrate of the payment of the money having been made for the maintenance of the child previous to the issuing of the summons; and further, it was objected that the assignment of perjury upon what the defendant swore respecting the payment of the money was upon a matter immaterial at the hearing of the summons.

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The defendant being convicted, both points were reserved by the learned Judge for the opinion of this Court.

As to the second objection we never entertained the smallest doubt—clearly thinking that it was necessary to prove at the hearing the payment of the money by the defendant as alleged; and further, that his payment of money for the maintenance of the child was corroborative evidence of the paternity.

As to the first objection, we took time to consider.

After examining the Acts of Parliament and the authorities upon the subject, I am of opinion that this objection ought to be overruled.

The proceeding against the putative father of a bastard child to obtain an order of affiliation and maintenance is not a proceeding *in poenam* to punish for a crime, but merely to impose a pecuniary obligation, and is a civil suit within the meaning of 14 & 15 *Vict. c. 99. ss. 2. and 3.*; see *Regina v. Lightfoot (a)*. For this reason the defendant was admitted as a witness on his own behalf. Then, what is the summons which we have to consider? Mere process to bring the defendant into Court in a civil suit.

I incline to think that, according to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money,

(a) 6 Ell. & Bl. 822.

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although it is not expressly required by the statute to be on oath, as is the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the Act of Parliament. But, supposing that, if the defendant had not appeared, the Petty Sessions could not lawfully have proceeded to hear evidence of the paternity; or that, if he had appeared and objected to the regularity of the summons, the objection ought to have prevailed. I am of opinion that when he actually appeared, and, instead of objecting to the regularity of the summons, he asked the Court to give judgment in his favour on the merits, and tendered evidence to absolve him from liability, he waived any irregularity there might be in the process, and that, when he had thus submitted himself to the jurisdiction of the Court, the Court had jurisdiction to hear and to decide the suit. No irregularity in the process to bring the defendant into Court in a civil suit can be taken advantage of by the defendant after he has appeared and pleaded and there has been judgment against him.

The defendant's counsel chiefly relied upon *Regina v. Scotton (a)*. But that was a criminal proceeding, the information being on a penal statute, to recover penalties for an offence created by Act of Parliament; and there the Act of Parliament expressly provides, that "before any proceeding shall be had or taken upon the information, either for summoning the party accused or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some person or persons other than the informer." Beyond the information, a distinct deposition to the truth of the charge is made necessary before the magistrates can take cog-

nizance of it. But the case of *Regina v. The Justices of Wiltshire* (a) seems exactly in point on the other side. That was a proceeding in bastardy, and (as the law then stood) the parish officers, who applied for an order of maintenance, were bound to give the putative father seven days notice of the application before the Petty Sessions. In that case the notice had not been regularly given, but the defendant appeared at the Petty Sessions, and, without objecting to the want of the seven days notice, desired the justices to remit the charge to the Quarter Sessions, and entered into the recognizances which the law required, and it was held that he could not afterwards object that there was a want of jurisdiction to hear the case, as the appearance and proceedings at the Petty Sessions cured the defect. Lord *Denman*.—"As to the want of proof of the seven days notice required by the Act, it is enough to say that the defendant appeared before the Petty Sessions, and did not insist on want of notice." *Littledale J.*—"Any objection that might have been made to the want of seven days notice was cured by his appearance, and by the steps taken by him before the justices in Petty Sessions." *Williams J.*—"The want of due notice, supposing none to have been given, was cured by what took place at the Petty Sessions." *Coleridge J.*—"The answer to the objection that no sufficient notice was given to appear at the Petty Sessions is, that the party *has* appeared, and, without objecting to the want of notice, has elected to have the case sent to the next Quarter Sessions, and entered into a recognizance accordingly. Now this cures the want of notice, and makes it unnecessary to consider whether there was one in fact, or whether it is sufficiently stated in the order."

There are various other cases illustrating the same

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(a) 12 Ad. & Ell. 793.

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principle, to be found in the books, but I do not consider it necessary now to comment upon them.

Thinking that any irregularity in the form of the summons, or in the manner in which it was granted, was waived and cured by the defendant having appeared, and, without objection, submitted to the jurisdiction of the Petty Sessions, I am of opinion that the conviction ought to be affirmed.

MARTIN B.—I cannot agree in the judgment that has been delivered by my Lord ; but I do not wish the case to be argued before the fifteen Judges. I think the jurisdiction is a special one, and that to create it there must be a proof on oath as a condition precedent, and that no subsequent appearance can cure it.

I think the distinction is between a Court of general jurisdiction and a special one, and not between proceedings of a civil and criminal nature.

I think the cases cited do not apply ; in those cases the putative father was the active party in removing the case to the Quarter Sessions, where the objection was taken for the first time.

Conviction affirmed.



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REGINA v. RICHARD FLETCHER.

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J. C. 8 Corp C. Cas 131

THE following case was reserved by HILL J.

Richard Fletcher was tried before me at the Winter Assizes 1858 for *Liverpool*, upon a charge of rape committed upon the person of *Jane Jones*.

Jane Jones was proved at the trial to be of the age of 13 years at the time of the offence charged: she was also proved to be of weak intellect, to be incapable of distinguishing right from wrong. Her mother stated in her evidence that *Jane* was not allowed to go about by herself, and that she was unable to distinguish the house in which she lived from that of any of the neighbours. On the day in question *Jane* had left the house without her mother's knowledge, the prisoner met her and it was proved by witnesses who saw them that the prisoner had sexual intercourse with the girl; but she was not shewn to have offered any resistance, though she did exclaim whilst the prisoner was in the act that he hurt her, and on the prisoner rising from her and her getting up she made a start as if to run away. The girl *Jane Jones* was placed in the witness box, and I asked her several questions in the hearing of the jury to ascertain if she possessed sufficient intelligence to be sworn. I was satisfied that she did not.

It was objected, by counsel for prisoner, that the charge of rape was not made out, as it was not proved that the prisoner had carnal knowledge of the girl

The prisoner was indicted for a rape upon a girl of weak intellect, incapable of distinguishing right from wrong and who was not shewn to have offered any resistance. The Judge told the jury that if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and *against her will* they ought to convict; and also that, if they should be of opinion that the girl was incapable of giving consent or of exercising any judgment upon the matter, then, if they were satisfied upon the evidence that the prisoner had carnal

knowledge of the girl by force and *without her consent*, they ought to find him guilty. The jury found the prisoner guilty, and stated that they considered that the girl was incapable of giving consent from defect of understanding. *Held*, that the conviction was right.

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against her will. I left the case to the jury, and I stated to them that if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and against the will of the girl, they ought to convict the prisoner. Also, that if the jury should be of opinion that the girl was incapable of giving consent or of exercising any judgment upon the matter, then if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and without her consent, they ought to find the prisoner guilty.

The jury found the prisoner guilty, and in answer to a question from me they stated that they considered that *Jane Jones* was incapable of giving consent from defect of understanding.

I directed the verdict of guilty to be recorded, but postponed passing sentence until the judgment of the Court for the Consideration of Crown Cases could be obtained upon the case.

HUGH HILL.

December 24, 1858.

This case was argued, on 22nd *January* 1859, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

Joseph Kay appeared for the Crown, and *R. Assheton Cross* for the prisoner.

Cross, for the prisoner.—This conviction cannot be sustained. Rape is the carnal knowledge of a female forcibly and against her will (a). In 3 *Chitt. Crim. Law*, 810, it is said: "It is the essential feature of this crime that it must be *against the will* of the female on whom it is committed." It must be committed forcibly by the man and against the will of the woman.

(a) 1 Hale P. C. 627, 628; 1 123 b; 2 Inst. 180; 3 Inst. 60; 1 Hawk. P. C. c. 41, s. 2; Co. Litt. East, P. C. c. 10, s. 1, p. 434.

There is a class of cases in which fraud has been held to supply the want of both these ingredients. In *Regina v. Camplin* (a) where the prisoner having given a girl of thirteen years of age liquor for the purpose of exciting her, she became quite drunk, and when she was in a state of insensibility he violated her, it was held a rape; but that decision was upon the ground that the prisoner had supplied the want of force and violence by his own act; and the principle on which the judgment of the Court proceeded was explained by *Patteson J.*, who, when he afterwards passed sentence upon the prisoner, said (b): "Your case falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both."

In *Regina v. Case* (c) the prisoner, a medical man, had connexion with a girl of fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was then attending her, and the jury found that she made no resistance owing solely to the *bonâ fide* belief that such was the case; and he was held to be guilty of an assault, on the ground that her non-resistance was caused by his own fraud. These cases go to shew that there must be either force or fraud, and here there was no forcible connexion and no act of the prisoner to supply the want of that force and violence which are necessary to constitute the crime. In the present case, owing to the state of the girl's mind, she was incapable of exercising a will; the act therefore could not be against her will; that want of will was not caused by the prisoner, and on that ground the present case is distinguishable from those I have cited.

The next class of cases to which I would refer are

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(a) 1 Den. C. C. 89; S. C. 1
Car. & K. 746.

(b) 1 Car. & K. 749.

(c) 1 Den. C. C. 580.

1859. those in which it has been held that if a married
 FLETCHER'S woman assents to carnal connexion with a man under
 Case. the belief that he is her husband, the man cannot be
 convicted of rape.

Lord CAMPBELL C. J.—In those cases it was at first held that fraud supplied the place of force.

Cross.—The question was finally settled in *Rex v. Jackson* (a), in which it was decided that having carnal knowledge of a woman, under circumstances which induce her to suppose it is her husband, does not amount to a rape. That decision was followed in *Regina v. Williams* (b) and in other cases; and in *Regina v. Clarke* (c) the Judges refused to permit the question to be opened, considering themselves bound by the decision in *Rex v. Jackson*. There is another class of cases like that of *Regina v. Read* (d), where three boys were indicted for an assault on a girl of fourteen years. It was proved that each had connexion with her, and the jury found them guilty, “the child being an assenting party, but that from her tender years she did not know what she was about;” and it was held that a conviction for common assault could not be sustained.

This leads to those cases which relate to having carnal knowledge of children of tender years.

Previously to statute 18 *Eliz. c. 7.* it was doubted whether a rape could be committed upon a female child under ten years of age; *Dyer*, 304; 1 *East P. C.* 435. Mr. *East* says, that in consequence of that doubt section 4 of that statute, “for a plain declaration of the law,” enacts “that if any person shall carnally know and abuse any woman child under the age of ten years, every such unlawful carnal knowledge shall be felony.” Such doubts could scarcely have arisen

(a) *Russ. & Ry.* 487.

(b) 8 *Car. & P.* 286.

(c) *Dears. C. C.* 397.

(d) 1 *Den. C. C.* 377.

if the definition of rape had been such as is now contended for, and Mr. *East* in his commentary on that statute says:—"This last mentioned offence, however, is not properly speaking a rape, *which implies a carnal knowledge against the will of the party*; but a felony created by this statute, under which the consent or non-consent of the child under the age of ten years is immaterial." At page 448, when speaking of the form of indictment, Mr. *East* says: "If the indictment be upon the stat. 18 *Eliz.* for deflowering a child under ten years of age, with her consent, it seems necessary to conclude against the form of the statute; because the crime as well as the punishment is created by that statute. And on the same account it is necessary for the indictment to pursue the words of the Act, and charge that the defendant feloniously, unlawfully and carnally knew and abused, the party being under the age of ten years, without adding the words *ravished* for the reason before stated."

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If this be law, the case of an idiot would fall under the same reasoning.

LORD CAMPBELL C. J.—You have stated the result of the authorities very satisfactorily; but we shall be glad to have your commentary upon the statute 13 *Edw. 1. c. 34. (a)*. What do you say to the definition of rape in that statute, which enacts that "If a man do ravish a woman, married, maid or other, where she did not consent neither before nor after, he shall have judgment of life and of member?" (*b*)

Cross.—That section imports the definition of the word rape into the word ravish, and it does not alter the common law definition of rape; and if you were to

(a) Statute Westm. 2, c. 34.;
2 Co. Inst. 433. "Purview est, que
si home ravist feme espouse, dame-
selle, ou auter feme deformes, per

la ou el ne soit assentus, ne avant,
ne apres eyt judgement de vie et de
membre."

(b) 1 East P. C. 435.

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draw an indictment under that statute, you must have the word *rapuit* which includes force. If the definition of rape in the statute 13 *Edw.* 1. is taken to be against me, the doctrine which Mr. *East* lays down in his commentary upon the stat. 18 *Eliz.* c. 7. is not law; nor are the other authorities cited, which say that to constitute a rape it must be *against the will* of the woman.

Joseph Kay, for the Crown.—Rape is not rightly defined when it is said to be “the having unlawful and carnal knowledge of a woman by force and *against her will*.”

The true definition of rape is “the having unlawful and carnal knowledge of a woman by force and *without her consent*.”

That this is the true definition is clear from the statute of *Westminster* 2. c. 34. (1 *Hale P. C.* 627), by which rape was a second time made a felony. For some time previously it had been reduced to the nature of a misdemeanor. The words of the statute are: “If a man ravish a married woman, dame or damsel, where she neither assented before nor after, *eyt judgement de vie et de membre*; if she assent after, yet the King shall have the suit” (a).

But it is not necessary to rest the argument upon this statutable definition. There are two authorities expressly in point, *Regina v. Camplin* (b) and *Regina v. Ryan* (c). There is a very valuable note to the report of the case of *Regina v. Camplin* in *Denison's Crown Cases* (d), furnished by *Parke B.* after judgment had been delivered, and giving the reasons for the decision of the Judges in that case. In that note it is said that several of the Judges thought “that the crime of rape is committed by violating a woman

(a) See *antè*, p. 67, note (a).

(c) 2 Cox C. C. 115.

(b) 1 Den. C. C. 89.

(d) 1 Den. C. C., Addenda XVII.

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when she is in a state of insensibility and has no power over her will, whether such state is caused by the man or not, the accused knowing at the time that she is in that state; and *Tindal* C. J. and *Parke* B. remarked that in a stat. of *Westminster* 2. c. 34. the offence of rape is described to be ravishing a woman '*where she did not consent,*' and not ravishing *against her will.*" In *Regina v. Camplin* the woman was quite as incapable of exercising any will as in the case now before the Court. She was insensible, and she had been made so by liquor administered to her by the prisoner for the purpose of exciting desire; and whilst she was in that condition he had connexion with her. If it be essential to the crime of rape that it should have been committed *against the will* of the woman, or, in other words, that she should have exercised her will in opposition to the man, neither the considered case of *Regina v. Camplin* nor the case of *Regina v. Ryan* could be supported.

The note was furnished by *Parke* B. no doubt to explain the expressions which were attributed to *Patteson* J. by the report of the judgment in *Regina v. Camplin* which appeared in 1 Car. & Kir. 749, in which *Patteson* J. is made to say: "A great majority of the Judges are of opinion that the evidence that the rape was committed without the consent and *against the will* of the prosecutrix was sufficient, and that consequently the offence has been completely proved."

LORD CAMPBELL C. J.—That note is a very important one, and was evidently handed in to the reporter at the last moment.

Kay.—There is some evidence in this case that the offence was committed against the will of the girl, but that is not now relied on. The case of *Regina v. Ryan* (a) is directly in point. There the prisoner

(a) 2 Cox C. C. 115.

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Case. was convicted of a rape on the person of an idiot, who was unable to distinguish right from wrong, and *Platt B.*, in summing up, adopted the definition of rape laid down by the Judges in *Regina v. Camplin*, and said: "The question is, did the connexion take place *with her consent*? If she was in a state of unconsciousness at the time the connexion took place, whether it was produced by any act of the prisoner or by any act of her own, any one having connexion with her would be guilty of rape. If you believe that she was in a state of unconsciousness, the law assumes that the connexion took place *without her consent*, and the prisoner is guilty of the crime charged."

LORD CAMPBELL C. J.—My brother WILLES tells me he ruled in similar terms in a recent case which was tried before him.

WILLES J.—That case was tried before me at the *Old Bailey*. It was the case of a rape upon an idiot girl. I directed the jury that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connexion with her without her consent, it was their duty to find him guilty; but I also told them that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape.

Kay.—In *Regina v. Case (a)*, *Regina v. Clarke (b)*, *Regina v. Saunders (c)*, *Rex v. Jackson (d)* and *Regina v. Williams (e)*, the woman *consented*, although the consent was obtained by fraud.

Kay was stopped by the Court.

Cross, in reply.—*Regina v. Ryan* was the decision

(a) 1 Den. C. C. 580.

(d) Russ. & Ry. 487.

(b) Dears. C. C. 397.

(e) 8 Car. & P. 286.

(c) 8 Car. & P. 265.

of one Judge. The definition of rape by all the greater writers on the criminal law is opposed to the definition adopted in *Regina v. Camplin* and *Regina v. Ryan*, and explains the true meaning of the old statute of *Westminster*.

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LORD CAMPBELL C. J.—The question is, what is the real definition of the crime of rape, whether it is the ravishing a woman *against her will or without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. *Camplin's Case* seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an Act of Parliament. The statute of *Westminster* 2. c. 34. defines the crime to be where “a man do ravish a woman, married, maid, or other, *where she did not consent neither before nor after*” (a). We are bound by that definition, and it was adopted in *Camplin's Case*, acted upon in *Ryan's Case*, and subsequently in a case before my brother WILLES.

It would be monstrous to say that, if a drunken woman returning from market lay down and fell asleep by the roadside, and a man, by force, had connexion with her whilst she was in a state of insensibility and incapable of giving consent, he would not be guilty of rape.

MARTIN B.—I am quite content to take the definition of rape as we find it in the statute, and that definition has been adopted in the cases of *Regina v. Camplin* and *Regina v. Ryan*.

The other learned Judges concurred.

Conviction affirmed.

(a) 2 Co. Inst. 433.

1859. REGINA v. GEORGE CUNNINGHAM, GEORGE BROWN and EDWARD SUMMERS.

Three prisoners were indicted for feloniously cutting and wounding *E. R.* with intent to do him grievous bodily harm. The jury found two of them guilty of the felony charged, and the third guilty of the misdemeanor of unlawfully wounding. The venue of the indictment was *Glamorganshire*, and it appeared that the offence was committed on board an *American* ship in the *Penarth Roads* in the *Bristol Channel*, three quarters of a mile from the coast of *Glamorganshire*, at a spot never left dry by the tide, but within a quarter of a mile from the land which is left dry by the tide.

THE following case was reserved at the Summer Assizes for the county of *Glamorgan* by CROMPTON J.

The prisoners, who were stated by the prosecutor's counsel in his opening to be *American* subjects, though no proof was given of that fact, were indicted before me at the last Summer Assizes, 1858, for the county of *Glamorgan*, for feloniously wounding *Edward Riley*, in the county of *Glamorgan*, with intent to do him some grevous bodily harm. *Cunningham* and *Summers* were convicted of the felonious wounding, and *Brown* of the misdemeanor of maliciously and unlawfully wounding. The prisoners were the three mates of the *American* ship *Gleaner*, and *Riley* was a seaman on board the said ship. *The Gleaner* sailed from the docks of *Cardiff* on 29th of *May* last, and proceeded to an anchorage ground in *Penarth Roads*, where she anchored in eleven fathoms.

The offence in question took place shortly before she arrived at the above anchorage ground, and when the ship was three quarters of a mile from land in a place never left dry by the tide; but she was within

The place in question was between *Glamorganshire* and the *Flat Holms*, an island treated as part of the county of *Glamorgan*, the ship being at the time two miles from the island on the inside. It was about ten miles from the opposite shore of *Somersetshire*, and ninety miles from the roads to the mouth of the *Channel*.

Held, that the part of the sea where the vessel was at the time when the offence was committed was within the body of the county of *Glamorgan*.

Semle, that under section 5 of 14 & 15 *Vict. c. 19.*, it was competent for the jury to find two of the prisoners guilty of the felony charged, and the third guilty of unlawful wounding.

a quarter of a mile of the land which is left dry by the tide. The shore of the county of *Glamorgan* extends many miles up and down the *Bristol Channel* from the place where the offence was committed. The spot in question was in the *Bristol Channel* between the *Glamorganshire* and *Somersetshire* coasts, and was about ten miles or more from the opposite shore of *Somersetshire*. *Penarth Roads* are ordinary roadsteads for ships coming into *Cardiff* or calling there for orders, and large vessels anchor there.

Two islands called the *Flat* and *Steep Holms* are outside the anchorage ground, and farther from the shore than it is, but not lower down the *Channel*, being abreast of the anchorage grounds. It is about ninety miles from *Penarth Roads* to the mouth of the *Channel*. When the offence was committed, the ship was inside and about two miles from the *Flat Holms* and four or five miles from the *Steep Holms*, and was within *Lavernock Point* in *Penarth Roads*, but outside *Penarth Head*. *Penarth Head* and *Lavernock Point* form a bay. It is three miles from *Lavernock Point*. At *Penarth Head* persons can see from one to the other, and could see what a vessel was doing from one to the other, but could not see the people from one to the other. From where the ship was persons could see people at *Lavernock*, and see what they were doing if they took particular notice of them, and they could see the coast of *Somersetshire* on a clear day. *Flat Holms*, *Cardiff*, *Lavernock* and *Penarth* are laid down properly in a map shewn to one of the witnesses, a pilot, from a map of counties; but *Steep Holms* is laid down too far to the west there. The mouth of the *Severn* was proved to be at *King's Road* higher up the *Channel*, and that is to be taken as the finding of the jury.

A person who had been clerk to the borough ma-

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gistrates of *Cardiff* for five years stated in his evidence that he knew the *Holms*; that they are part of the parish of *St. Mary's, Cardiff*; that he had issued a warrant for poor rates there; that he never executed any such warrant, they were given to the overseers. And a collector of the income tax of the said parish stated that he knew the *Flat Holms*, and that he had collected taxes from the occupiers of the *Flat Holms* for *St. Mary's* parish. The *Gazette* of *Tuesday, 4th January, 1848*, was put in, containing an order of the Lords Commissioners of Her Majesty's Treasury, whereby the limits of the port of *Cardiff* were to commence at the river *Rumney*, and continue along the coast of the county of *Glamorgan* to a place called *Nash Point* in the said county; and that the limits seaward of the said port should extend to a distance from low-water mark of three miles into the sea, including all islands, rivers and creeks within the said limits. The place in question was within these limits. It was proved by a witness that the port of *Cardiff* extends to the *Nash Point* eighteen miles lower down the *Channel* than the place in question. Ships hail from *Lavernock* to the port of *Cardiff*. The *Nash* is marked with a + in the county map above referred to and is two miles from *St. Donat's*, and *Lavernock* is the place marked *Aberthaw* in that map, and is under the custom-house at *Cardiff*. A true chart of the places inside the *Penarth Head* accompanies this case (a): all in the chart is in the port of *Cardiff*: a pencil + on the chart shews the place where the offence was committed, at the mouth of the river *Ely*, being a quarter of a mile to sea beyond low-water mark, but in the port of *Cardiff*. A ship anchoring there would not pay harbour dues; and the place is not a harbour, but a roadstead. A clerk in the *Cardiff*

(a) The chart did not in fact accompany the case.

custom-house stated that he knew the limits of the port of *Cardiff* as read from the *Gazette*; that the officers of the customs of the port of *Cardiff* act within these limits in every way that their duty requires them; but he said, on cross-examination, that he was a clerk and had executed no official duty except at the office; that the creek of *Aberthaw* was within the port of *Cardiff*, and that he had attended with the comptroller at a survey on that creek, but he did not appear to have personally seen any other exercise of jurisdiction within the limits.

The indictment charging the offence to have been committed in the county of *Glamorgan*, and not being framed under the 7 & 8 *Vict. c. 2.*, as it contained no averment, according to the 2nd section, that the facts had taken place "on the high seas," the question arose whether the prisoners could properly be convicted of the offence in the county of *Glamorgan* upon so much of the above facts as were properly admissible in evidence against the prisoners, and there was a further question whether the prisoner *Brown* could be properly convicted of the misdemeanor of unlawfully wounding on the same count upon which the two other prisoners were found guilty of the felonious wounding. I sentenced the prisoners *Cunningham* and *Summers* each to six years penal servitude, and the prisoner *Brown* to eight months hard labour, and they are now in confinement under such sentences.

I reserved for the consideration of this Court the two questions.

First: Whether the prisoners were properly convicted of an offence in the county of *Glamorgan*; and,

Secondly: Whether the prisoner *Brown* was properly convicted of misdemeanor.

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This case was argued before COCKBURN C. J., WIGHTMAN J., WILLIAMS J., CHANNELL B. and HILL J. on the 13th *November* 1858, and the 15th *January* 1859.

Bowen appeared for the Crown, and *Hardinge Giffard* for the prisoners.

Hardinge Giffard, for the prisoners — There was no evidence that the offence was committed within the county of *Glamorgan*. It was in fact committed on the high seas; and, although such offences are triable, by statute, by justices of oyer and terminer, and the county where the trial is had may be laid as the venue in the margin, the indictment in this case does not allege that the material facts took place on the high seas, and it is therefore essential to prove that the place where the alleged offence was committed was within the body of the county named as the venue in the margin of the indictment.

At common law the place where the offence was committed was within the jurisdiction of the Admiralty, and it was therefore not within any county. It is laid down in *Sir H. Constable's Case* (a), and broadly stated by Lord Coke (b), that below the low water mark the admiral has the sole jurisdiction, and between the high and low water mark the common law and the admiral have *divisum imperium*. "When the sea flows," it is said, "and has *plenitudinem maris*, the admiral shall have jurisdiction of everything done on the water between the high water mark and low water mark, by the ordinary and natural course of the sea, and so it was adjudged, in the case of *Lacey* (c), that the felony committed on the sea *ad plenitudinem maris*, between the high water

(a) 5 Rep. 105*b*.

(b) 4 Inst. cap. 22.

(c) 3 Inst. 48. 113, and authorities referred to in *Constable's Case*.

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mark and the low water mark by the ordinary and natural course of the sea the admiral should have jurisdiction of; and yet when the sea ebbs the land may belong to a subject, and everything done on the land when the sea is ebbcd shall be tried at the common law, for it is then parcel of the county, and *infra corp.' comitat.'* So note that below the low water mark the admiral has the sole and absolute jurisdiction; between the high water mark and low water mark the common law and the admiral have *divisum imperium* interchangeably as is aforesaid, one *super aquam* and the other *super terram*." *A fortiori* then the place where this offence was committed is *primâ facie* beyond the limits of any county, as it is found by the case that it was a place three quarters of a mile from land and a quarter of a mile from the land which is left dry by the tide.

It will be contended that the place where the ship was was *infra fauces terræ*. But that is not so.

Lord Hale, in his treatise *De Jure Maris* (a), says: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner; 8 E. 2. *Corone*, 399." But Mr. East, in his Pleas of the Crown (b), prefers the more limited construction of Mr. Serjeant Hawkins, who, he says, "considers the line more accurately confined by other authorities to such parts of the sea where a man, standing on the side of the land, may see what is done on the other;" and of the latter opinion was Lord Coke; *Admiralty Case* (c). Here the *locus in quo* is not within the imaginary line, for an imaginary right line from Penarth Head to Lavernock Point would not include it.

(a) Hale de Jure Maris (Hargrave's Law Tracts), c. 4, p. 10.

(b) 2 East P. C. c. 17, s. 10.

(c) 12 Rep. 79, 80.

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HILL J.—Do you say that the Admiralty and the common law Courts had not concurrent jurisdiction?

Giffard.—Not at common law. The recitals in the statute 15 *Richard* 2. c. 3. shew that the statute for the first time created a concurrent jurisdiction. In *Regina v. Bruce* (a) it was held that the Courts of common law have concurrent jurisdiction with the Admiralty in havens, creeks and rivers; but here the offence was committed on the high seas. *Constable's Case* lays it down broadly that the jurisdiction in such a case is in the admiral; and in the *Admiralty Case* Lord Coke says, "The sea within the jurisdiction of the admiral is described to be out of every county; for if the sea be within any county, then *pais* may come from thence, and the admiral hath jurisdiction where the common law cannot give remedy." The jurisdiction of the admiral was, in ancient time, called *maritima Angliæ*, and sometimes *marina Angliæ* (b).

It is said that the *locus in quo* is in the parish of *Saint Mary's, Cardiff*, which is within the county of *Glamorgan*; but even if it is so the question of parish is quite immaterial when you come to consider in what county a place is. A parish may be in two counties. There is no presumption of law that because part of a parish is within a particular county, all the parish is in that county also. There is no presumption of law as to the boundary of a county. The county of *Southampton* includes the *Isle of Wight*, but it does not follow that the intervening sea is within the county of *Southampton*: *The Attorney General v. Parmeter* (c). *Saint Martin's-le-Grand* is within the city of *Westminster*, but is entirely isolated, and the intervening space is within the city of *London*.

(a) 2 Leach C. C. 1093.

(b) *Admiralty Case*, 12 Rep. 80.

(c) 10 Price, 378.

There are many similar instances of isolated parts of parishes where the intervening space is in a different parish.

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But the place where the ship was was in fact upon the high seas, for the main sea or ocean is the same as the high seas.

COCKBURN C. J.—The sea at this spot is an inland sea and land-locked, and not part of the high seas or the highway of nations as you put it.

Giffard.—There is no authority for any such distinction as an inland sea. A sea which has only one exit and entrance may nevertheless be the highway of nations, just as there may be a highway in a *cul de sac*; *Bateman v. Bluck* (a). Stress of weather and the exigence of navigation may render it necessary for a vessel to come within two points from which an imaginary straight line would include it. *British* vessels on the *American* coast would be upon such an hypothesis often within the *American* territory. Further, what shape is to be given to an inland sea, semicircular, triangular, or what? It would be impossible to define it. In any sea out of cannon shot, universal user is presumed; *The Twee Gebroeders* (b).

COCKBURN C. J.—*Primâ facie*, would not the sea between the outlying land and the county be in the county?

Giffard.—That is a fact to be proved, not to be presumed. No legal presumption can arise; and in the recent case of *Regina v. Musson* (c) the Court of Queen's Bench would not presume that land between high and low water mark formed part of the contiguous parish. The same rule holds good in this case.

(a) 18 Queen's Bench Rep. 870.

(b) 3 Rob. Adm. Rep. 339.

(c) 27 Law Jour. M. C. 100.

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COCKBURN C. J.—You would not dispute that the place was within the jurisdiction of the admiral?

Giffard.—No. The ship might be within the dominion of *England*, but was not shewn to be in any particular county; neither was it shewn that it was in a bay or a creek, or within the *fauces terræ*, unless that includes every spot that can be seen from the shore. The spot is within cannon shot of the shore, and the rule is *terræ dominium finitur ubi finitur armorum vis*. The Queen by her fleets and armies may have jurisdiction, but it is by her jurisdiction as a Sovereign prince commanding her fleets, and not by the coroners of the county.

WIGHTMAN J.—The spot is between the county of *Glamorgan* and two islands which are in the parish of *Cardiff* which is in the county of *Glamorgan*. The Reform Act annexes the *Flat Holms* to *Glamorganshire*.

Giffard.—That is merely for the purpose of electing members of parliament; and further the section referred to makes provision for the *out* lying parts of counties; that imports that there is a something *not* the county lying between.

WILLIAMS J.—Where do you say the high seas begin?

Giffard.—Where the county ends. So Lord *Hale* says.

WILLIAMS J.—What then is an arm or branch of the sea?

Giffard.—There is no definite legal meaning. Lord *Hale* only says that an arm or branch of the sea which lies within the *fauces terræ* “is, or at least *may be*, within the body of a county;” that is, it is in the body of a county if proved to be so.

The other question in this case is whether the pri-

soner *Brown* was properly convicted of a misdemeanor. This question raises a somewhat metaphysical difficulty. The three prisoners were indicted for feloniously wounding the prosecutor with intent to do him some grievous bodily harm, and the jury found two of them guilty of the felony charged, and found the other (*Brown*) guilty of the misdemeanor of maliciously and unlawfully wounding. The statute 14 & 15 Vict. c. 19. s. 5. provides that, upon the trial of an indictment for feloniously cutting and wounding, the jury may acquit of the felony and convict of unlawfully wounding; but I submit that the offence charged being a joint offence, and one common intent being charged in the indictment, it was not competent for the jury to find the intent as to two of the prisoners, and negative that intent as to the other (*a*).

Bowen, for the Crown.—The indictment is sufficient even if the place where the vessel was was not in the county of *Glamorgan*, but in the jurisdiction of the Admiralty. By section 2 of 7 & 8 Vict. c. 2., which was an Act for the more speedy trial of offences committed on the high seas, it is enacted that the venue in the margin shall be the same as if the offence had been committed in the county where the trial is had; and in *Regina v. Jones* (*b*) it was held that an indictment under that statute need not contain an averment that the offence was committed within the jurisdiction of the Admiralty. After that came the statute 14 & 15 Vict. c. 100. s. 23., which enacted that it shall not be

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(*a*) The section is as follows :—
“If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in

such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing or wounding.”

(*b*) 1 Den. C. C. 101.

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necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that when a local description is required such local description shall be given in the body of the indictment. If the offence in question had taken place in the streets of *Cardiff*, the venue in the margin would have been sufficient.

COCKBURN C. J.—But in *Regina v. Jones* it was stated in the indictment that the offence was committed on the high seas, and that is not done here.

Bowen.—The place in question was within the body of the county of *Glamorgan*. It was within the *fauces terræ*. In 2 *East P. C.* 802, it is said: “Lord *Hale* says that before the latter end of the reign of *Edward 3* the Court of Queen’s Bench not only had but exercised a concurrent jurisdiction with the Admiralty over felonies committed upon the narrow seas and on the coast, though on the high seas, being considered within the realm of *England*, though out of the bodies of counties; and the fact was presented and tried by men of the adjacent counties; but it is agreed on all hands that the admiral never had jurisdiction in any river, creek or port within the body of a county.”

The place in question was not the high seas; and Lord *Hale* says in his treatise *De Jure Maris* (a): “The narrow sea adjoining to the coast of *England* is part of the wast and demesnes and dominions of the King of *England*, whether it lie within the body of any county or not. This is abundantly proved by that learned treatise of Master *Selden* called *Mare Clausum*.”

The question as to the line of demarcation between

(a) Hargrave’s Law Tracts, 10.

the county and the high seas is more a matter of fact than law, and is determinable by local evidence.

In *Regina v. Bruce* (a) it is said that the Judges seemed to think that the common law had a concurrent jurisdiction with the Admiralty in all havens, creeks and rivers in this realm; and in the report of that case in *Leach's Crown Cases* it is said that during the discussion of this point the construction of the statute 28 *Hen.* 8. c. 15. by Lord *Hale* in his *Pleas of the Crown* (b) was much preferred to the doctrine of Lord *Coke* in his *Institutes* (c). Lord *Hale* says: "That arm or branch of the sea which lies within the *fauces terræ* where a man may reasonably discern between shore and shore" is within the body of a county. Lord *Coke*, on the other hand, adopts a more limited definition, and considers the line to be confined to such parts of the sea "where a man standing on the side of the land may see what is done on the other."

COCKBURN C. J.—Then you say that the place in question is within the definition of Lord *Hale*, and not within that of Lord *Coke*?

Bowen.—Yes, and Lord *Hale's* definition was in *Regina v. Bruce* preferred to that of Lord *Coke*.

COCKBURN C. J.—You say if not within the *fauces terræ* it is within the *terra* itself?

Bowen.—I do. The *Holms*, which is in the county of *Glamorgan*, was outside the place where the ship was. Moreover, the place in question is in fact within the limits of the port of *Cardiff*. Lord *Hale*, *De Portibus Maris* (d), says: "A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles." "A creek is of two

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(a) 2 *Leach*. C. C. 1093; S. C. Russ. & Ry. 243.

(b) 2 *Hale* P. C. 16, 17.

(c) 3 *Inst.* 111; 4 *Inst.* 134.

(d) *Hargrave's Law Tracts*, 45.

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kinds, creeks of the sea and creeks of ports," and at page 48 he says, "The state of the ports and creeks hereof at this day stand thus:" then in the list given we find "*Cardiff cum membris*," and in the list is "*Penarth*," the place in question. Further, by 9 & 10 *Vict. c. 102. s. 14.*, the Lords of the Treasury have power by warrant to appoint ports and quays and declare the limits and bounds thereof. They have by an order published in the *London Gazette*, January 4th, 1848, defined the limits of the port of *Cardiff*, and the place in question is within the limits of the port so defined.

COCKBURN C. J.—The port of *London* extends to the counties of *Essex* and *Kent*.

Bowen.—The fact that the *Holms* is treated as part of the parish of *Saint Mary's, Cardiff*, which parish is undoubtedly in the county of *Glamorgan*, is strong evidence that the part of the sea where the offence was committed, and which lies between the *Holms* and the coast of *Glamorgan*, is also within the county.

As to the other point: the prisoner *Brown* was rightly convicted of a misdemeanor. The jury had a discretion vested in them by the 14 & 15 *Vict. c. 19. s. 5.*, and they properly exercised that discretion.

Giffard, in reply.—As to the conviction of the prisoner *Brown*, I contend that the jury could not find different intents on a count charging one common intent; *Regina v. Bird (a)*. What authority is there for dividing a common intent, and saying, where a joint intent is charged, that there were different degrees of intention?

Straight, officer of the Court (*amic. cur.*) mentioned the case of *Regina v. Fenwick (b)*, tried at the *Lincolnshire* Spring Assizes, 1844, in which several prisoners were jointly indicted under stat. 7 *Wm. 4 & 1 Vict. c. 85. s. 11.* for feloniously stabbing and wounding

(a) 2 Den. C. C. 94.

(b) 1 Cox C. C. 36.

John Kidd, with intent to do him some grievous bodily harm; and *Gurney B.*, after consulting *Tindal C. J.*, told the jury that if, in their opinion, the evidence was satisfactory as respected one of the prisoners, and they thought that he was guilty, still they could not convict the other two of felony unless they concurred in the intent to do the prosecutor some grievous bodily harm; but if the jury were satisfied that the other two prisoners were present at the commission of the felony, and were guilty of some interference short of that, they might convict them of a common assault (a).

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WIGHTMAN J.—If two prisoners are charged with wounding a man with a certain intent, and by the evidence it appears that one had the intent and the other had not, may not the jury say so by their verdict?

Giffard.—*Brown's* sentence has nearly expired, and that point is not very material. As to the main point: it is said that because *Penarth Head* is in the Port of *Cardiff* it is therefore in the county of *Glamorgan*. The town of *Newport* is included in that port, and yet that is in the county of *Monmouth*.

Supposing there is evidence that the *Holms* is within the county, there is no evidence that the intermediate space is so; no evidence of any act of ownership or dominion in the intermediate space, and no presumption that it belongs to any county at all. If the owner of *Penarth Head* were the owner of the *Holms* and he claimed the intermediate land, would it be sufficient to start a *prima facie* case by shewing his ownership of *Penarth Head* and the *Holms*?

(a) See also the previous case (1843) of *Regina v. Archer and Others*, 2 Moo. C. C. 283. There the Judges, upon a case reserved, held that, on an indictment against

several for feloniously cutting, &c., one might be found guilty of an assault only, and others of the felony in the same assault.

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The Judges retired for a short time, and then the judgment of the Court was delivered by

COCKBURN C. J.—In this case we are of opinion that the conviction is right. The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of *Glamorgan*; and we are of opinion that it does. The sea in question is part of the *Bristol Channel*, both shores of which form part of *England* and *Wales*, of the county of *Somerset* on the one side and the county of *Glamorgan* on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the *Holms*, between which and the shore of the county of *Glamorgan* the place in question is situated, having always been treated as part of the parish of *Cardiff* and as part of the county of *Glamorgan*, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of *Somerset* and *Glamorgan* is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of *Glamorgan*.

Conviction affirmed.

REGINA v. SAMUEL RICE, TIMOTHY FOLEY, 1859.
BENJAMAN JOHNSON and JOHN PREEDY.

THE following case was reserved and stated by the Chairman of the *Surrey* Sessions.

At the General Quarter Sessions of the Peace, holden by adjournment at *Saint Mary, Newington*, in and for the county of *Surrey*, on *Monday* the nineteenth day of *July* in the year of our Lord one thousand eight hundred and fifty-eight, *Samuel Rice, Timothy Foley, Benjamin Johnson* and *John Preedy* were tried and convicted under an indictment containing the two following counts and a count laying previous convictions.

Surrey, } The jurors for our lady the Queen upon
to wit. } their oath present that *Samuel Rice, Timothy Foley, Benjamin Johnson* and *John Preedy* on the twenty-sixth day of *June* in the year of our Lord one thousand eight hundred and fifty-eight, eight hundred and fifty pounds weight of lead the property of *William Randall Wood* then being fixed to a certain wharf of the said *William Randall Wood* situated in the parish of *Wandsworth* in the county of *Surrey* feloniously did steal take and carry away against the form of the statute in such case made and provided.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *Samuel Rice, Timothy Foley, Benjamin Johnson* and *John Preedy* on the same day and year aforesaid eight hundred and fifty pounds weight of lead of the property of *William Randall Wood* feloniously did steal take and carry away against the form of the statute in such case made and provided.

A count in an indictment, framed upon sect. 44 of 7 & 8 Geo. 4. c. 29., charged the prisoners with stealing lead "then being fixed to a certain wharf;" not alleging that the wharf was a "building." It was proved that the lead formed the gutters of two sheds on the prosecutor's wharf, which sheds were constructed of brick, timber and tiles. *Held*, that it was sufficiently alleged and proved that the prisoners had stolen lead "fixed to a building."

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From the evidence given on the trial of the prisoners, it was proved that the lead stolen formed the gutters of two sheds on the wharf of the prosecutor, which sheds were constructed of brick, timber and tiles, with lead gutters.

At the trial the jury found a general verdict of guilty against all the prisoners upon both of the counts above set forth; and the Court reserved the following points for the consideration of the Justices of either bench and Barons of the Exchequer.

First: Whether the allegation in the first count, that the lead was fixed to a wharf, is sufficient to shew that it was fixed to a building within the meaning of the statute 7 & 8 *Geo. 4. c. 29. s. 44.*

And second: Could the prisoners be convicted on the second count of simple larceny, there being no evidence of the stealing of any other lead than that which had been affixed to the wharf?

The Court postponed judgment, and committed the said *Samuel Rice, Timothy Foley, Benjamin Johnson* and *John Preedy* to prison until the questions above mentioned should have been considered and determined.

This case was argued on 22nd *January* 1859, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

Knapp appeared for the Crown, and *Laxton* for the prisoners.

Laxton, for the prisoners.—This indictment is founded upon section 44 of statute 7 & 8 *Geo. 4. c. 29.*, which enacts that “if any person shall steal, or rip, cut or break with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever,” every such offender shall be guilty of felony. 1st.

The indictment is insufficient. The word "wharf" does not occur in the section on which this indictment is framed. "Building" is the word used in the statute, and the word "wharf" does not necessarily imply a "building."

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Lord CAMPBELL C. J.—A wharf *may be* a building; and here it is proved to be so.

Laxton.—In criminal pleading, the strict construction is to be adopted. The ordinary meaning of the term wharf is a plain flat surface bordering on a pier where goods may be landed; and though it is true that in many cases, as at *Liverpool* and the docks of *London*, the wharfs are buildings rising to several stories from the water's edge, a wharf may be a floating wharf, and not a building at all; and, if it were so, stealing lead from such a wharf would not be the offence contemplated by the statute. An indictment under a statute must clearly allege the statutable offence, and this indictment does not state that which is necessarily an offence under the statute.

2nd. There is a variance between the indictment and the proof. The indictment alleges that the lead was fixed to a wharf, and the proof is that it was fixed to a shed, which is not shewn by the evidence to be fixed to the wharf.

Knapp, for the Crown, was not called upon.

Lord CAMPBELL C. J.—It must be taken as a fact in this case that the sheds, which are composed of brick, timber and tiles, are sheds on a wharf fixed to the soil. The sheds must be considered as part of the wharf. It is enough if the indictment alleges that the lead is fixed to that which may be a building and which is proved by the evidence to be one. The allegation that the lead was fixed to a wharf, without saying that the wharf is a building, imposes that burden of proof on the prosecutor; but there is

1859. sufficient evidence here to shew that that which the lead was affixed to was in fact a building. The conviction therefore upon the first count is right.

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CROWDER J.—The evidence must be fairly taken to shew that the shed from which the lead was stolen was part and parcel of the wharf itself.

WILLES J.—The conviction could not have been supported unless it had been proved that the lead was fixed to such a wharf as is a building within the statute.

The other learned Judges concurred.

Conviction affirmed.

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REGINA v. GEORGE SMITH BETTS.

The prisoner was a miller's foreman. It was his duty to sell flour to customers, to enter the sales in a double check book, to give the customers a copy of the entry, and retain the counter-foil for his master's inspection, and to enter in a cash book his receipts and payments immediately upon their being made.

THE following case was reserved by the Chairman of the *Kesteven* Quarter Sessions.

Linconshire, } At the General Quarter Sessions of the
Kesteven. } Peace of our Sovereign lady the Queen, holden at *Bourn*, in and for the said parts and county, on *Monday* the 28th day of *June*, 1858, before the Right Honourable Sir *John Trollope* Baronet, Chairman, *William Parker* Esq., and others, justices of the peace of our said lady the Queen, *George Smith Betts* was indicted for that he, on the 24th day of *May*, 1858, at *Spittlegate*, feloniously did steal, take and carry away 20 stones weight of sharps of the goods and chattels of *John Basker* and another. Upon the trial it was proved that the prosecutors, *John Basker* and his

Once a week there was a settlement of these books and accounts with his master. Upon a sale of some flour he received the money from the buyer and gave her a receipt with a check taken from a book belonging to his master, but not from the regular book; and, having fraudulently omitted to make any entry of the transaction, appropriated the money which he so received. *Held*, that the prisoner could not be convicted of a larceny of the flour.

brother, were millers in partnership, having a mill at *Spittlegate*, and that the prisoner had for six months been in their employ at weekly wages as foreman at the mill, superintending the business by selling for them, on credit or for ready money, flour, sharps, &c.; and that the prisoner was furnished with a printed double check book (the check and counterfoil) and also with a cash book, the former for entries to contain the name of the purchaser, the date of purchase, the quantity purchased and the price charged, a copy of which it was his duty to deliver with the goods to the purchaser at the time of sale, retaining the counterfoil in the book for the inspection of his masters on settling his weekly account; and the latter (the cash book) to contain an immediate entry and account of receipts and payments by the prisoner. A settlement of these books and accounts between master and servant took place every *Saturday* night, when the books were produced and examined and the balance paid over. It was also proved (the result of suspicions and inquiry) that *Mary Moss*, who kept a retail shop in *Spittlegate*, on *Thursday* the 20th of *May*, 1858, gave the prisoner an order for eight stones of sharps, which were delivered on the same day by *John Cook*, the waggoner in the employ of the prosecutors, without a check having been delivered at the same time, *Cook* having asked the prisoner for such check, and received for answer that he (the prisoner) would take the check himself and that Mrs. *Moss* would pay him; and the price, eight shillings, was paid by Mrs. *Moss* to the prisoner on the following *Saturday* morning. It was also proved that again, on *Monday* the 24th of *May*, Mrs. *Moss* gave the prisoner another order for twelve stones of sharps, which were delivered on the same day, and paid for on the following *Saturday* by Mrs. *Moss* to the prisoner. Upon each occasion the sharps were weighed by the prisoner in the

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presence of *John Cook* the waggoner, as servant in the employ of the prosecutors, placed in sacks belonging to the prosecutors, and on the first occasion conveyed by *Cook* in prosecutor's waggon to *Moss's* house where the same were shot into a bin by him (*Cook*); and on the second occasion the prisoner accompanied *Cook* with the prosecutor's waggon to *Moss's* house, and took the sharps out of the waggon and shot them into the bin. The prisoner delivered checks to *Moss* in the course of each day of the delivery of the goods, and on payment being made gave a receipt at the foot of the check; but the checks so delivered, and although belonging to the prosecutors, and precisely similar, were not taken from the regular check book in use. There was not any entry, either in the check book or in the cash book, of the sale of the sharps or payment of the money. The first sale and payment ought to have appeared in the accounts delivered by the prisoner on *Saturday* the 22nd *May*, and the second sale and payment in the accounts delivered by the prisoner on *Saturday* the 29th of *May*. For stealing these eight stones and twelve stones, making together the twenty stones of sharps, the prisoner was apprehended, committed, tried and convicted. Upon the verdict of guilty being pronounced, the prisoner's counsel asked the justices to grant a case for the Court of Criminal Appeal on the point whether the prisoner was, upon the facts proved, legally guilty of larceny, and the indictment sustainable. Whereupon the Court granted the application and postponed judgment on the conviction, and discharged the prisoner on recognizance of bail to appear and receive judgment. The opinion of the Court hereon is therefore respectfully requested.

This case was considered by POLLOCK C. B., WIGHTMAN J., WILLIAMS J., BYLES J. and HILL J.

No counsel appeared.

The judgment of the Court was given, on the 5th of *February*, 1859, by

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POLLOCK C. B.—In this case the prisoner, instead of being indicted for embezzling the money received by him for the goods delivered to a customer upon that customer's orders, was indicted for stealing the goods. He neglected to make the entries of the sale in the books, which it was his duty to make, and, by omitting to give his master credit for the proceeds of the sale, he concealed the sale from his master. The Court are of opinion that as the goods were actually sold, though the prisoner appropriated the money which he received for them, he could not be indicted for stealing the goods. As between the buyer and the prisoner's master there was an actual sale; and what the prisoner did which was objectionable was, not the selling the goods, but appropriating the money instead of making the proper entries and handing it over to his master; and the Court are of opinion that in so doing he was not guilty of stealing the goods; although he was no doubt guilty of embezzling the price.

Conviction quashed.

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REGINA v. WILLIAM ROWE.

1859.

THE following case was reserved by the Chairman of the *Glamorganshire* Quarter Sessions.

The prisoner
was convicted
of stealing
iron, the

property of the Company of the proprietors of the *Glamorganshire Canal Navigation*. It appeared that while the canal was in process of being cleaned, the prisoner (who was not in the employ of the Canal Company, but a stranger,) took away from the bed of the canal the iron in question. It also appeared that iron found by the Company during such cleansing would, if the owner could be found, be returned to him, but otherwise would be kept by the Company. *Held*, that the Canal Company had sufficient property in and possession of the iron to maintain an indictment for larceny, and that the conviction was right.

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At the *Glamorganshire* Midsummer Quarter Sessions 1858, *William Rowe* was indicted for stealing 16 cwt. of iron of the goods and chattels of *The Company of Proprietors of the Glamorganshire Canal Navigation*.

It appeared by the evidence that the iron had been taken from the canal by the prisoner, who was not in the employ of the Canal Company, while it was in process of being cleaned. The manager of the canal stated that, if the property found on such occasions in the canal can be identified, it is returned to the owner. If it cannot, it is kept by the Company.

It was objected that, as the Canal Company are not carriers, but only find a road for the conveyance of goods by private owners, the property was not properly laid as that of the Canal Company. The prisoner was convicted, and sentenced to two calendar months imprisonment in the House of Correction at *Cardiff*, but was released on bail (a).

This case was considered, on 22nd *November*, 1858, by POLLOCK C. B., WIGHTMAN J., WILLIAMS J., CHANNELL B., BYLES J. and HILL J.

No counsel appeared.

Cur. adv. vult.

On 5th *February*, 1859, the judgment of the Court was given by

POLLOCK C. B.—The Judges who have considered this case are unanimously of opinion that the conviction should be affirmed. The case finds that some iron had been stolen by the prisoner from the canal while the canal was in process of cleaning, and while the water was out. The prisoner was not in the employ of the Canal Company, but a stranger; and

(a) *Armory v. Delamire*, 1 Stra. 505; S. C. 1 Smith's L. C. 151.

the property of the Company in the iron before it was taken away by the prisoner was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the possession of the landlord for the purpose of delivering it up to the true owner; and he has sufficient possession to maintain an indictment for larceny.

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Conviction affirmed.

REGINA v. WILLIAM BERRY.

1859.

THE following case was reserved and stated by *M. B. Armstrong, Esq., Q. C.*, the Recorder of *Manchester*.

William Berry was indicted at the General Sessions for the city of *Manchester*, held at *Manchester* on the 2nd day of *August*, 1858, and was found guilty of stealing one bed, two boxes, four pairs of blankets, six sheets, two dresses and two carpets, the property of *Robert Elliott*, of the value of 5*l.* and more, in his dwelling-house. On the 5th of *June*, and for six months previous, the prisoner lodged at the house of the prosecutor, and knew that the prosecutor would

The prisoner was convicted of stealing articles of furniture the property of *R. E.*, of the value of 5*l.* and more, in his dwelling-house at *Manchester*. It appeared that the prisoner was a lodger in the house of the prosecutor at *Manchester*; that the prisoner pro-

cured a horse and cart, and he and the prosecutor's wife put the articles in question in the cart and had them conveyed to the railway station, from whence the prisoner, the prosecutor's wife and her three children, left by train for *Leeds*. A fortnight afterwards the prisoner and the prosecutor's wife were found living together in *Leeds* in a house which she had taken in her own name, and in the house were all the articles so taken from the prosecutor's house at *Manchester*. On the trial the prosecutor's wife was called as a witness on behalf of the prisoner, and swore that they had not gone away for the purpose of carrying on an adulterous intercourse, and never had committed adultery together. The Judge directed the jury, that if they were satisfied that, when the prisoner and prosecutor's wife so took the property, they went away together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but, that, if they believed the evidence of the wife, the prisoner was entitled to an acquittal. *Held*, that the direction was right.

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Case.

have to go out very early that morning. On the 4th of *June* prisoner engaged a porter to be near the prosecutor's house at 7 o'clock the next morning with his cart; he went there: the prisoner came to him and took him to the door of the prosecutor's house, where he drew up his cart. The prisoner and the wife of the prosecutor were then together in the house, and were jointly engaged in packing up the articles mentioned in the indictment in boxes; and, when so packed up, the prisoner brought the boxes to the door and the carter assisted him to put them upon the cart. They were then driven to the railway station, prisoner, prosecutor's wife and her three children accompanying them, and all left by the train for *Leeds*. A fortnight after this the prisoner and the prosecutor's wife were found living together in a house in *Leeds*, which she had taken in her own name. They were both in the house when the prosecutor and an officer went there, and all the property so taken from the prosecutor's house at *Manchester* was found there. The prosecutor's wife was called on the part of the prisoner, and swore that they had not gone away for the purpose of carrying on an adulterous intercourse, and in fact never had committed adultery together.

I told the jury that if they were satisfied that the prisoner and the prosecutor's wife, when they so took the property, went away together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but that, if they believed the wife that they did not go away with any such criminal purpose, and had never committed adultery together at all, the prisoner would be entitled to his acquittal.

The jury found him guilty.

The question for the opinion of the Court of Criminal Appeal is, whether my direction was right.

Sentence was deferred, and the prisoner admitted to bail. *M. B. Armstrong,*
Recorder of *Manchester.* 1859.
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Case.

This case was considered, on 22nd *November*, 1858, by POLLOCK C. B., WIGHTMAN J., WILLIAMS J., BYLES J. and HILL J.

No counsel appeared. *Cur. adv. vult.*

On 5th *February*, 1859, the judgment of the Court was given by

POLLOCK C. B.—This conviction will be affirmed.

Conviction affirmed.

REGINA *v.* ALFRED SKEEN and ARCHIBALD FREEMAN. 1859.

THE following case was reserved by POLLOCK C. B. The defendants were indicted for having
Alfred Skeen and Archibald Freeman were tried

fraudulently transferred for their own benefit a bill of lading intrusted to them as brokers.

The indictment was framed on section 6 of 5 & 6 *Vict. c. 39.*, which contains a proviso that no agent shall be liable to be convicted by any evidence in respect of any act done by him if he shall at any time previous to his being indicted for such offence have disclosed the same in any examination before any Commissioner of bankruptcy.

The defendants were charged with the offence in question before a magistrate and committed for trial; the depositions which were then taken containing ample evidence to support the charge.

The defendants had previously been adjudged bankrupts; and subsequently to their committal as aforesaid, but before indictment, they were taken by their creditors before a Commissioner in bankruptcy, and then made a statement which was substantially an admission of the same facts as were stated by the witnesses in the depositions.

On the trial, the examinations of the defendants in bankruptcy were offered by them as a defence, it being contended that, ~~they~~ having disclosed the act before a Commissioner previous to indictment, they were protected by the proviso, and were not liable to be convicted.

Held, that the evidence of a disclosure was admissible under the plea of not guilty.

Held, by the majority of the Court (Lord CAMPBELL C. J., POLLOCK C. B., WIGHTMAN J., MARTIN B., WILLES J., BRAMWELL B., WATSON B., CHANNELL B. and HILL J.), that, as the prisoners only stated before the Commissioner that which had been previously known and previously proved by evidence before the magistrate, they had not made a disclosure within the meaning of the proviso, and consequently were not entitled to its protection.

Held, by the minority of the Court (COCKBURN C. J., WILLIAMS J., CROMPTON J., CROWDER J. and BYLES J.), that as the statement was made before indictment, on a compulsory examination before a Commissioner in bankruptcy instituted *bonâ fide* by the creditors, it was a disclosure within the meaning of the proviso, to the protection of which the defendants were therefore entitled.

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before me at the *October* Sessions, 1858, holden for the jurisdiction of the Central Criminal Court, upon an indictment which charged them that, having been entrusted as brokers and agents with a bill of lading of a cargo of timber, they had, without the authority of their principals and in violation of good faith, fraudulently transferred and delivered the bill of lading for their own benefit.

The indictment was framed upon the statute 5 & 6 *Vict. c. 39.*, which, in the section which creates the offence, contains the following proviso: "Provided that no agent shall be liable to be convicted by any evidence whatsoever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed the same in any examination or deposition before any Commissioner of bankruptcy."

The prisoners pleaded Not guilty, and, at the close of the evidence for the Crown, their counsel tendered the examination in writing of each of them taken before the Commissioner under a fiat duly issued. The counsel for the Crown objected that under the plea of Not guilty those examinations were not admissible. I admitted the evidence, but reserved the points arising upon it, and the examinations were put in and read, of which copies accompany the case; and also copies of the depositions before the magistrate, upon which the prisoners were committed for trial, and a copy of the evidence before me, accompany this case. The prisoners were committed for trial on the 13th of *July*. The examination of the prisoners before the Commissioner of bankruptcy took place on 26th of *July*, subsequent to their committal but before the indictment was preferred. I left the facts to the jury, excluding from their consideration the examination before the Commissioner, the effect of

which I thought was matter of law, and reserved it accordingly. The jury found the prisoners Guilty; and I have to request the opinion of the Court of Criminal Appeal:—

First, Whether the written examinations of the prisoners were admissible under the plea of Not guilty.

Secondly, Whether those examinations were such a disclosure of the offence of the prisoners, within the meaning of the proviso above quoted, as under the circumstances of the case rendered them not liable to be convicted.

Judgment is respited on the said indictment. The prisoners have been admitted to bail (a).

FRED. POLLOCK.

(a) The following documents accompanied the case, pursuant to the Order of the Court on the first hearing. It seems to have been admitted, by the learned counsel for the prisoners, that their examination before the Commissioner in bankruptcy was an admission by them of the same facts as were stated by the witnesses in the depositions taken before the magistrate.

Depositions before the magistrates upon which the prisoners were committed for trial, and which were duly taken on oath the 13th day of July, 1858, before Alderman Sir Peter Laurie, in the presence and hearing of the prisoners *Alfred Skeen* and *Archibald Freeman*, who were charged for that *James Cavan* and others, his partners, did, on the 24th day of May last, in the said city, intrust to the said *Alfred Skeen* and *Archibald Freeman*, then

and there being agents of the said *James Cavan* and others, his partners, a certain warrant for the delivery and transfer of goods, to wit, 153 logs of greenheart timber, the property and goods of the said *James Cavan* and others, his partners, and for that the said *Alfred Skeen* and *Archibald Freeman*, being such agents as aforesaid, did afterwards in the said city, contrary to and without the authority of the said *James Cavan* and others, his partners, for their own benefit and in violation of good faith, unlawfully make a deposit of the said warrant with Sir *Robert Walter Carden*, Knight, and others, bankers, as and by way of a pledge, lien, and security for certain large sums of money advanced by the said Sir *Robert Walter Carden*, Knight, and others, bankers, to them the said *Alfred Skeen* and *Archibald Freeman*, against the statute, &c.

Edward Ballard on his oath saith as follows:—I live at 38,

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This case came on to be argued, on the 25th November, 1858, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., BYLES J. and HILL J.

St. Paul's Terrace, Canonbury. I am shipping clerk to *James Cavan* and others, of 29, *Finsbury Circus*, *West India* merchants. I attend to the shipping department, and have the authority to indorse, by procuration, bills of lading. In the month of *April* last we had advice of a consignment of timber by a ship called *The Glide*. The defendants carried on the business of timber brokers, in *Broad Street*; they were the brokers employed by our firm to sell timber. On receiving advice I gave the defendants a specification of the timber to sell for arrival if the proper price could be obtained. I left the specification in the defendants' office with a clerk, and I afterwards saw both the defendants, and had a conversation with them on the subject of the timber. They both said that they had not obtained a sufficient price to induce them to sell the timber. On the 24th *May* last a clerk from the defendants, whom I believe to be *Joshua Freeman*, now present, called on me; he applied on the part of the defendants for the bill of lading, and in consequence of what he represented to me I gave him the bill of lading relating to 153 logs of greenheart timber by *The Glide*. The bill of lading was not indorsed when I gave it him; he went away and took it with him. In about half an hour afterwards he brought back the bill of lading and he made a further representation to me, and in consequence of what he then said I indorsed the bill of lading and gave it him. I heard no more of this matter till the 28th of *June*,

and in consequence of information I received about the bill of lading I went to the dock house the following day. The bill of lading produced by Mr. *Hayward* is the one I gave to the defendants' clerk; it is now indorsed "Deliver to Mr. *John Scott* or order, *Skeen* and *Freeman*." Mr. *John Scott* is the security clerk of the *City Bank*. The defendants had no lien on the bill of lading, they had not made any advance to us upon it.

Joshua Charles Freeman on his oath saith as follows:—I live at 5, *Bath Villas, De Beauvoir Road, Kingsland*. I am clerk to the defendants. I am 19 years of age. I am the nephew of the defendant *Freeman*. I went to the counting house of Messrs. *Cavan & Co.*, and saw the last witness Mr. *Ballard*, and obtained from him the bill of lading produced. I was requested by my employers to apply for it. Mr. *Freeman* requested me. The *City Bank* at that time held securities of our own for advances made to my employers. Some of those securities refer to goods brought by the ship *Laura Campbell*. It became necessary to deliver some of those goods. It was mentioned to Mr. *Freeman* that there was a necessity to deliver those goods. About the time, either before or after I applied for the bill of lading, there was a conversation as to the necessity of delivering the goods brought by *The Laura Campbell*. Mr. *Freeman* desired me to apply for that bill of lading. I think it was on the day I first made application for the bill of lading. Mr. *Skeen* was not then present when

Ballantine Serjt. (with him *B. C. Robinson*) appeared for *Skeen*, and *Hardinge Giffard* appeared for *Freeman*. No counsel appeared for the Crown.

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that direction was given to me. I had had no conversation with Mr. *Skeen* about the bill of lading up to the time I had orders from Mr. *Freeman* to apply for it. This conversation took place at Mr. *Freeman*'s house; he was then at home ill. When Mr. *Freeman* desired me to get the bill of lading he did not give me any specific directions what to do with it. I obtained the bill of lading, on my first application, from Mr. *Ballard*, it was at that time unindorsed. When I first got the bill of lading I took it to the defendants' counting house. My uncle was then at home. I did not see Mr. *Skeen* between the time I returned with the bill of lading to the counting house and the time I went the second time for it. I went a second time and obtained an indorsement on the bill of lading. I did this by no particular directions that I remember. When I took the bill of lading to the counting house I then observed it was unindorsed, and knowing that the bill of lading was totally useless without being indorsed I took it back. It was necessary to have the bill of lading indorsed preparatory to its being lodged at the dock house. It is not necessary for the purpose of obtaining a purchaser for the timber that the bill of lading should be indorsed. I obtained the indorsement from Mr. *Ballard*, and having obtained it I put it into our cash box. Neither Mr. *Skeen* nor Mr. *Freeman* were present when I put it into the cash box. The next day I took the bill of lading to my uncle. I went to my uncle on other business,

and he desired me to bring the bill of lading. I went back and got it, and Mr. *Freeman* wrote the indorsement on the following morning. Two days after I got it. When I left it with him in the evening, I merely said, "Here is the bill of lading. The following morning the defendant *Freeman* indorsed the bill of lading. *Freeman* merely wrote on the back of the bill of lading "*Skeen & Freeman*." The words "Deliver to Mr. *John Scott* or order" were not on the bill of lading. At the time *Freeman* indorsed the bill of lading, he stated that it was a very awkward affair about *The Laura Campbell*, as the people were clamorous for the delivery order of *The Laura Campbell*. He then said—"Suppose I lodge this bill of lading temporarily for a few days at the *City Bank*, in lieu of the documents relating to the goods by *The Laura Campbell*, and he said I expect to be in receipt of funds to replace it. I had told Mr. *Freeman* that the people had been clamorous for their orders by *The Laura Campbell*; this was about a week before Mr. *Freeman* wrote a letter to Mr. *White*, the manager of the *City Bank*, and inclosed the bill of lading in the letter; it is the letter produced; the following is a copy of it. "*Oakley Terrace, 25th May, 1858. Dear Sir. Will you* "be kind enough to give the bearer "the warrant for the Cedar pr. "*Laura Campbell*, and hold the "enclosed bill of lading as security "instead, till I see you—it is worth "about 1,800*l.* at the least. When "I get to the City, which I hoped "to have done to-day, I shall do

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POLLOCK C. B. expressed a strong opinion that counsel ought to have been instructed on behalf of the Crown (a).

"as I said, immediately see Messrs. "O. G. & Co., with a view of re-
"moving all the loans from you.
"Yours faithfully. A. Freeman.
A. J. White, Esq." O. G. & Co.
mentioned in the letter, refer to
Overend & Gurney. I took the
letter inclosing the bill of lading
to the *City Bank* on the 26th of
May. I should say the letter is
mis-dated, it is dated the 25th of
May; it was the 26th of *May* I
saw Mr. White, and gave him the
letter, which he opened in my pre-
sence. Mr. White kept the bill of
lading.

Augustus Jackson White, on his
oath, saith as follows:—I live at
16, *Roupell Park, Streatham*; I am
manager of the *City Bank*. The
defendants had an account at our
house. Our bank made them ad-
vances to nearly 10,000*l*. We had
dock warrants and other securities
against the advances; the value of
the dock warrants, including the
bill of lading in question, was about
5000*l*., at the time the defendants
stopped payment. Among the dock
warrants we had some relating to
The Laura Campbell. One of the
warrants relating to *The Laura
Campbell* referred to 264 logs of
cedar. That warrant was lodged
some time before the 26th of *May*.
I think that warrant was lodged
with us about the latter end of last
year. I knew the defendants as
timber brokers. I have no reason

to believe they carried on any other
business. The last witness brought
me the letter produced I think on
the 26th of *May* last. The bill of
lading produced was inclosed in the
letter. I believe the words "De-
liver to Mr. John Scott or order"
on the back of the bill of lading to
be in the handwriting of Mr. Scott,
our security clerk. It was not
written at the time I received the
bill of lading from the last witness.
I requested the defendants' clerk
to call again in an hour. I am not
sure the clerk called again; but I
saw Mr. Sheen in the afternoon of
the same day. I had kept the bill
of lading. I told Mr. Sheen that
we could not part with the cedars
by *The Laura Campbell* unless they
would undertake to hand the pro-
ceeds to us, and then I should have
no objection to take this bill of
lading as a collateral security for
our so doing. He pressed me to
comply with his request, but I told
him I could not deliver any of the
cedar on any other terms: he, Mr.
Sheen, merely offered the bill of
lading as security in the usual way.
I do not remember that Mr. Sheen
said the bill of lading would be
sure to be redeemed. I don't re-
member Mr. Sheen saying that he
was very averse to the transaction,
for the bill of lading did not belong
to them. After some discussion
this letter was prepared by Mr.
Scott, and Mr. Sheen took it away

(a) The reason for not instruct-
ing counsel did not appear. The
costs incurred by the prosecutor
would have been allowed as part

of the costs of the prosecution; see
Regina v. Lewis, Dears. & Bell,
C. C. 326.

Ballantine Serjt. commenced his argument on behalf of the prisoner *Skeen*; but the Court intimated that, considering the importance of the question, it ought

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with him and the bill of lading also. He said he should not like to sign it until he had considered it, and he would take away the letter, and he did take the letter away and the bill of lading also. He did not say he did not like the transaction, the bill was not theirs. But *Mr. Skeen* said to me, after the failure, that he was very sorry that the bill of lading was ever lodged with us. *Mr. Skeen* brought the letter produced back, the following morning, accompanied by *Mr. Freeman's* nephew. The letter is signed, I believe, by *Mr. Skeen*. It is as follows:—"75, Old Broad Street. London, 26th May, 1858. A. J. White, Esq., Manager, City Bank. Sir, You hold a warrant for 264 logs of Cedar, ex *Laura Campbell*, 155 S. & F. of this we have sold 112 155 J. Cd. logs and require to deliver them. We shall therefore be obliged by your indorsing the warrant for 155 S. & F. delivery to us of the 112 155 J. Cd. logs and ordering a new warrant to be made out for the remainder of the parcel in name of your security clerk. The proceeds of 155 S. & F. these 112 155 J. Cd. logs, say 1,277l., we engage to hand over to you within one month from this date; and in consideration of your so doing, we hand you herewith, as additional collateral security, bill of lading for 153 logs greenheart pr. *Glide @ Demerara*, which you will please lodge at the Dock office, and take out a prime warrant in the name of your clerk, Mr. Scott. We remain, Sir, Your

"obedient Servants, *Skeen & Freeman*. The present value of the "153 logs, greenheart 'pr. *Glide*,' "referred to above, say 195 loads "at 9l. £1755
"Less freight charges 780

"Is £975"

The bill of lading was lodged at the Docks the same day.

Cross-examined for *Freeman* and *Skeen* by *Mr. Depree*. To the best of my knowledge *Mr. Skeen* took away the bill of lading with the letter; he left the bill of lading with us, asking us to deliver up the cedars by *The Laura Campbell*. In the first instance the bill of lading came to us in a letter from *Mr. Freeman*. I am not quite certain that I gave back the bill of lading with the letter, but my impression is that I did. I will not undertake to swear that I did deliver back the bill of lading; my impression is that I did, but I am not quite sure about that. I think I had not seen *Mr. Skeen* on the subject of securities previously to this. *Mr. Skeen* called on us in consequence of our requiring this letter.

Re-examined. This conversation took place in my room at the *City Bank*. I think our chief clerk was present at the time. I think the object of *Mr. Skeen* calling was for an answer to the application.

Elves Remnant Charles Hayward on his oath saith as follows. I live at No. 2, *Leo Cottage, Cowley Road, North Brixton*. I am clerk in the *East and West India Dock House, Billiter Square*. I produce the bill of lading re-

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to be heard by the fifteen Judges, and the hearing of the case was postponed accordingly. The Court also ordered that the depositions of the several witnesses

ferring to 153 logs of greenheart timber by the ship *Glide*, from *Demerara*. It was lodged with the present indorsement on it on the 26th of *May* last.

The prisoners were duly addressed and cautioned by the magistrate, whereupon the said *Alfred Sheen* said as follows : " I wish this paper read."

The following is a copy of the paper : " I did not deposit the bill of lading with the *City Bank*. Nor did I authorize any person to deposit it. Nor was I aware it had been deposited till some time after the *City Bank* had got it in their possession. Whatever I did afterwards was done solely with the object of restoring it to Messrs. *Cavan, Brothers*. *Alfred Sheen*, *July* 13th, 1858."

This paper having been read, the said *Alfred Sheen* further said : I wish to add Mr. *White* is in error in stating that the bill of lading was sent with the letter. I had never seen that bill of lading any where till five minutes ago. I refer to the letter which Mr. *White* says the bill of lading was sent with to the office. I never saw that bill of lading till I saw it here to-day. I never saw the bill of lading at all. Mr. *White* did not give me back the bill of lading when he gave me the letter of the 26th of *May*.

The said *Archibald Freeman* said as follows :—I leave it to my solicitor.

The following are the examinations in bankruptcy taken, on 26th *July*, 1858, before Mr. Commissioner *Goulbourn*.

In the matter of *Alfred Sheen* and *Archibald Freeman*, trading under the style or firm of *Sheen and Freeman*, of No. 75, *Old Broad Street*, in the City of *London*, timber brokers, dealers and chapmen, against whom a petition for adjudication of bankruptcy was filed on the 6th day of *July*, 1858. The prisoners attended in pursuance of a summons or warrant requiring them personally to be and appear before the said commissioner, the commissioner acting in the prosecution of the said petition, on *Monday* the said 26th day of *July*, 1858, to be examined by virtue of the said petition and the statute in such case made and provided.

Archibald Freeman, the above named, on his solemn declaration, saith :—

I have been in partnership with the above named *Alfred Sheen* about seven years as timber brokers for the purchase and sale of timber on commission. The *City Bank* were our bankers for the last two years. Our business with that bank was of the ordinary description. They discounted our bills, and we drew checks upon them in the ordinary way ; we had no other account with the bank than a current account ; we were in the habit of lodging dock warrants with our bankers as security for money advanced. I think this practice extended over the whole time of our keeping the account. Our books do not shew what securities we lodged from

taken before the magistrate on the charge being made, and also the examination of the defendants in the Court of Bankruptcy, should accompany the case.

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time to time with the bank. They gave us no receipt for the securities so lodged, and there is no record that I am aware of to shew what securities were so lodged from time to time. The bank was generally in advance to us.

Upon each occasion when we made deposits with the bank there was an understanding between us and the bankers as to the amount to be placed to our credit, and this amount was calculated upon the estimated amount of the securities we lodged.

Our account was not made up at the bank except half yearly, viz., on the last day of *June* and the last day of *December* in each year. It appears from our pass book that, on the last day of *June*, 1857, there was a balance of 453*l.* 15*s.* 7*d.* to our credit.

It would be impossible for me to state now what securities the bank then held from us, nor how much the bank had then advanced upon the securities deposited. On each occasion when we deposited securities, the amount at which the securities were valued was placed to our credit, as so much cash. On the morning of the 14th of *August*, 1857, the balance to our credit at the *City* was about 2316*l.*, but I do not know what securities the bank held to cover that sum.

On that day I lodged with the bank the dock warrants for the cedar by *The Laura Campbell*, consisting of 295 logs.

We estimated the value for the purposes of loan at 2000*l.*, and the bank on that day gave us credit for 2000*l.*

Subsequently to this transaction we made many other deposits with the bankers from time to time, lodging with them various securities, and taking up from time to time the securities previously lodged.

The bank kept a loan account with us, but I have never seen this account, and they have not furnished us with any copy.

We kept a loan account in our ledger, but it does not distinguish between the loans we had from the bank and other parties, though upon reference to other books, such as the journal and cash book, the amounts received from the bank on any particular day can be ascertained; but, as already stated, there was no specification of the securities lodged.

The dock warrant of *The Laura Campbell*, on the 14th *August*, 1857, when it was lodged by us with the *City Bank*, was the property of Mr. *Edwin Sheen*, a brother of my partner.

The timber represented by that dock warrant was imported by *Barnard, Hall & Co.*, of *Liverpool*, and they forwarded us the bill of lading, with instructions for sale, at the end of *July* or the beginning of *August*, 1857.

We sold the cedar to *Edwin Sheen* on the 25th *August*, 1857, for 2321*l.* 1*s.* 6*d.*, taking his acceptances at six months in payment of the amount.

We negotiated these acceptances in the ordinary course of business, but we did not hand the warrants for the cedar to Mr. *Sheen*, but held them as security.

1859. The case was argued accordingly on 22nd *January*,
 1859, before Lord CAMPBELL C. J., COCKBURN C. J.,
 POLLOCK C. B., WIGHTMAN J., WILLIAMS J., MARTIN B.,

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On the 8th of *September*, by the direction of *Edwin Sheen*, we sold at a public sale 19 of the logs of cedar included in the 295 already referred to.

I cannot state who the purchaser or purchasers were.

We were ourselves the sellers.

About the same time there were 8 logs delivered to Mr. *Sheen* for his own private use, and I went to the bank and obtained the delivery order for 27 logs, and got a new warrant for the remainder, namely, 268 logs.

That fresh warrant was lodged at the *City Bank* immediately after it was drawn up, but we have no record of the particular day on which it was so lodged.

There was no further transaction in respect of the cedar until the 30th *March*, 1858, when we sold the 268 logs for Mr. *Sheen* on his account and by his direction.

The sale was by private contract to Mr. *Charles Hoar*.

Sheen's acceptances were due before the last mentioned date, but they had been retired by us and renewed.

Mr. *Hoar* purchased the 268 logs for 1868*l.* 12*s.* 3*d.*, for which we took his acceptances at four months, which were discounted with *Overend, Gurney & Co.* on the 8th *June*, 1858, and the amount of the discount went to our credit.

The warrant remained with the bank until the 12th of *May*; on that day we sold 156 logs of the cedar on account and by the direction of Mr. *Hoar*. I know from our books, and from the information of others, that we received the

dock warrant from the *City Bank*, but I did not myself personally attend to any business from about the 20th of *April* to the end of *June*.

I was not at home when Messrs. *Cavan, Brothers & Co.* sent us a specification of the timber on its way from *Demerara* by the ship *Glide*. I was then at *Liverpool*, and Mr. *Ballard*, who represents Messrs. *Cavan, Brothers*, having written us the note, which I now produce, and which is marked with the letter A (a), that note was forwarded to me at *Liverpool*, and received by me on or about the 23rd of *April*.

The ship did not arrive until the month of *May*, and I was then at home ill.

After the ship arrived, my nephew, Mr. *Joshua Freeman*, applied for the bill of lading, but I am unable to state upon what day.

My nephew, in calling on me at my private house, said "*The Glide* is arrived, shall I call for the bill of lading?" or words to that effect, and I said, "yes." I gave no directions what was to be done with the bill of lading.

On or about the 25th of *May* my nephew mentioned that the buyers of the logs per *The Laura Campbell* were in want of the goods, but I do not remember anything further passing between him and me on that day.

On the same day that my nephew brought me the bill of lading which had been received from *Cavan, Brothers*, I enclosed it in a private note to Mr. *White*, the manager of the *City Bank*.

CROMPTON J., CROWDER J., WILLES J., BRAMWELL B.,
WATSON B., CHANNELL B., BYLES J. and HILL J.

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Case.

No counsel appeared for the Crown.

This note was written in the parlour of my private house, and I believe in the presence of my nephew. I kept no copy of it.

I believe I told Mr. *White* in this note that he would oblige me by handing my nephew the warrant for the 264 logs of cedar by *The Laura Campbell*, and by his holding the bill of lading per *Glide* for three or four days until he saw me. I was not able to see Mr. *White* for several days, but I understood before I did see him that he had delivered the warrant for the logs of cedar to my nephew.

I had nothing further to do with the transaction in any way; but my nephew told me that Mr. *White* had declined to deliver the warrant for the logs of cedar on my private note, and required the order of the firm, which had been sent. I have no recollection of ever having signed any agreement with the bank, and I do not remember any instance of any payment in satisfaction of a specific loan. I am unable to give any explanation of the entries in my bankers' pass book debiting agreement stamps.

I do not believe that the 2000*l.* advanced by the bank on the warrant for the 264 logs by *The Laura Campbell* was specifically paid off; but, after that advance was made, sums to a much larger amount were credited to us by the bank.

It appears by my bankers' book, under date 28th *November*, 1857, that there was a loan of 11,950*l.* by the bank, and that I was credited on that day with the same sum of 11,950*l.* as repaid.

I am totally unable myself to

explain these entries of the transaction to which they refer; but I have no doubt our clerk, Mr. *Mendham*, can explain it.

Alfred Skeen, the above named bankrupt, on his solemn declaration, saith:—I have been in partnership for about seven years with the above named *Archibald Freeman*.

I took the out part of the business at the docks, and left the financial and book keeping department to my partner.

I was never in the habit of transacting any business with our bankers.

In the month of *May* last my partner was absent from business at his home.

I did not know at that time what securities were deposited with the *City Bank*.

Two or three days before the 26th *May* our book keeper mentioned to me that he thought it would be advisable I should go over to the bank and see Mr. *White*, the manager, and see how our account stood with the bank.

I began at this time, for the first time, to doubt whether we could meet our engagements.

I went over to Mr. *White* and asked him how we stood; he told me that the bank had certain securities, and that we owed them a large balance, for which they held those securities.

Mr. *White* had a memorandum containing, as I understood, a list of the securities; but he did not give it to me or give me, in fact, any document or figures in writing; he asked me my opinion as to the

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Ballantine Serjt. (with him *B. C. Robinson*) appeared for *Skeen*, and *Hardinge Giffard* for *Freeman*. The arguments of the learned counsel were, in substance,

value of various securities on which specific advances had been made.

I think it was at this interview that he told me that my partner had made an application to him, Mr. *White*, for the release of *The Laura Campbell* cargo, but I think this was all he said on the subject.

I do not believe that, at the time this interview took place, the bill of lading per *Glide* had come into the hands of Mr. *White*; the impression which this interview left on my mind was, that the bank was more than covered by the securities held by it.

I heard nothing more until the 26th of May, when Mr. *Joshua Freeman*, my partner's nephew, informed me that the cedar per *Laura Campbell* was free for delivery, for he had deposited the bill of lading per *Glide* with the bank, and Mr. *White* had agreed to give up the warrant for the cedar upon that deposit.

I was much annoyed by this announcement, and told Mr. *Joshua Freeman* that if the bill of lading was not restored to Messrs. *Cavan* within half an hour, I would inform them of the transaction.

Joshua Freeman observed, in reply, that his uncle had only lodged the bill of lading for a day or two, when it would be redeemed, by money to be obtained from *Overend, Gurney & Co.* by discounts.

I had previously learned myself, at the docks, that the purchasers of the cedar were anxious and pressing for the delivery of their timber. Mr. *Joshua Freeman* also told me that Mr. *White* wished to see me at the *City Bank*; and I

went there with *Joshua Freeman*. We were introduced into Mr. *White's* private room, and he told me that my partner had lodged the *Glide's* bill of lading with the bank, and that, upon my signing a letter which he produced already written, he would deliver up the dock warrant for *The Laura Campbell's* cedar. I read the letter, and excused myself from signing it at that time, and took it with me.

I said nothing further at that time about the *Glide's* bill of lading.

On the following morning I signed the letter, and either took or forwarded it to the bank.

I did this, fearing that *Cavan & Co.* would come to a knowledge of the transaction, and believing the assurance of my partner's nephew, that the bill of lading would be redeemed in the course of a day or two by my partner.

I did not receive the warrant myself for the cedar, but left it to *Joshua Freeman* to arrange that transaction.

Some days afterwards, on a *Saturday*, about five o'clock, I was sent to from the bank, and again saw Mr. *White*: this was previously to our having stopped payment.

Mr. *White* asked me if we could pay any money against the bank's advances.

I told him I could not do so at that time, but I added that I was most anxious for the release of the *Glide's* bill of lading, as we had made no advances upon it, and that *Cavan, Brothers*, even paid their own freight, and that the bill of lading ought never to have been lodged.

as follows. The elaborate judgments subsequently delivered have rendered it unnecessary to set out the arguments more fully.

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I do not remember that Mr. *White* made any remark on this.

Before I made this communication to Mr. *White*, the warrant for the cedar, per *The Laura Campbell*, had been delivered to us: the delivery to the purchasers of the timber was an office arrangement.

The transaction above referred to is the only one I had with our bankers.

I never saw the bill of lading of the timber ex *Glide*, until it was produced by Mr. *White* at the Justice Room, *Guildhall*, on *Tuesday* the 13th *July* instant.

—————
The following is a copy of the learned Judge's notes on the trial.

CENTRAL CRIMINAL COURT.

October 29th, 1858.

The QUEEN v. SKEEN AND FREEMAN.

Indicted for misdemeanour under 6th section of 5 & 6 *Vict.* c. 39.

Edward Ballard.—I am shipping clerk to Messrs. *Cavan, Brothers & Co., West India* merchants, of 29, *Finsbury Circus*. In *April* 1858, we received advice of consignments of timber. The prisoners are timber merchants. In *April* last we employed the prisoners to sell some timber of which we had received advice. I saw prisoners about particulars. I have seen both at different times. I said they might dispose of it on arrival at a suitable price. They had directions to sell the timber. I had conversation with the prisoner *Freeman* previous to the arrival of the vessel called

The Glide. He said he had not sold the timber, there was no sufficient offer made. On or about 24th *May* a clerk of theirs, *Joshua Freeman*, called and asked for the bill of lading, as he wanted to lodge it at the docks—on that I gave him the bill of lading—this is it—at that time it was not indorsed—he then left and took the bill of lading with him—in half an hour he returned and said it was useless—not being indorsed—on which I indorsed it—having authority to do so. He took it then away indorsed. On the 28th of *June* following I went to the docks—I found a transfer had been made of the bill of lading from our name—it was indorsed. “Deliver to Mr. *John Scott* or order, *Sheen and Freeman*” were not on it when I delivered it to the clerk. Our firm was not indebted to the prisoners—they had no claim whatever on the bill of lading. I had conversation with the prisoner *Sheen* after the arrival of the vessel—he did not tell me he did not know of the deposit of warrant.

Augustus Jackson White.—I am manager of the *City Bank*—the prisoners had an account at our house. The bank has often made advances to them on warrants. I have made advances to them on *The Laura Campbell*. On the 26th *May*, *Freeman* junr. came with a letter from his uncle, the prisoner *Freeman*. I know the prisoner *Freeman*'s handwriting. (Letter put in and read).^{*} It is the prisoner *Freeman*'s handwriting. The

^{*} This letter is set out in the deposition of *Joshua Charles Freeman*, ante, p. 101.

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1. A statutable disclosure within section 6 of the statute 5 & 6 *Vict. c. 39.* is a defence under the plea of not guilty, and need not be specially pleaded.

2. The statement made by the prisoners in the Court of Bankruptcy was a sufficient disclosure within that section. The fact that a charge had been previously made before a magistrate, and supported by evidence, does not destroy the effect which the prisoners' statement before the commissioner would otherwise have had. Examinations before a magistrate are often imperfect, and require corroboration and additional proof.

[POLLOCK C. B.—It must be taken that all that the prisoners could disclose was known before. I desired that the evidence should be set out in order to satisfy the Court that nothing came out before me which had

letter was from private residence. The bill of lading came with the letter. It was indorsed in blank by (I believe) *Freeman*. I kept the bill of lading. Later in the day I saw the prisoner *Skeen*—he came to the bank. *Freeman* junr. came first to know if their request was granted. I said I wished to see one of the partners—on that the prisoner *Skeen* came (he said) in consequence of my message. I told him we could only take the bill of lading, in exchange for *The Laura Campbell*, on the firm signing a letter promising to hand over the proceeds to us of the wood by *The Laura Campbell* when it was received. We were to hold the bill of lading of *The Glide* in the meantime, as security that the proceeds of *The Laura Campbell* should be given to us when received. He said if we would prepare the form of letter he would

sign it. Our clerk drew out a letter; he took it away with him, saying he wished to consider of it. Next morning he brought it back, signed "*Skeen & Freeman*." I believe it is the prisoner *Skeen*'s handwriting—(Letter put in and read).*

Cross-examined.—"Deliver to *John Scott*, or order," was not put till it was necessary to transfer the goods.

Re-examined.—We did not consider the bill of lading ours till after the arrangement was completed. I understood the prisoner *Skeen* attended to the dock department.

Charles Hayward.—I am a clerk in *The East and West India Docks*. The bill of lading was lodged at the docks on 26th May by Mr. *Scott*. It was indorsed as it now is.

* This letter is set out in Mr. *White's* deposition, *ante*, p. 103.

not already appeared before the magistrate and before the Commissioner.]

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[COCKBURN C. J.—The contention on the part of the prosecution is that, the facts having been already disclosed before the magistrate, there could be no further disclosure of what was already known.]

There is nothing in the statute to render a disclosure made before a magistrate more effective than one made in an attorney's office, or to a creditor, or a private individual. A matter, generally, may be well known to the creditors of a bankrupt and others; yet it may be of great importance to induce the bankrupt to give a full, particular and detailed explanation. If it be fully known in every necessary particular, the creditors would not take the defaulting agent before the commissioner to have him examined; and the fact of their requiring him to be examined shews that there was something connected with the transaction which it was important for him to explain.

[POLLOCK C. B.—If your construction is the right one, this statute would, for the purposes of punishing crime, be valueless. Directly a bankrupt knew that his fraudulent conduct was known, and that he was likely to be prosecuted, he would get some friend to cause him to be examined in the Court of Bankruptcy, where he could make a disclosure which would protect him.]

It is not argued that if a prisoner came voluntarily before the commissioner, or was taken before him collusively by a friendly creditor, the statute would apply. No suggestion has been made but that the proceedings here against the prisoners were hostile to them, and *bonâ fide*. Were it otherwise, the fraud would avoid the benefit of the disclosure. It is hardly possible to imagine a case in which something of the

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charge is not known to many persons. It may be known in part to one person, in part to another. The attorney for the principals or the attorney for the creditors probably must know it, even if the principals or creditors themselves do not, before the agent can be taken before the Commissioner to be examined; but till then there is no disclosure to the proper person, namely to the Commissioner. If the word "disclose" is held to mean to reveal something not hitherto known, the statute will be practically inoperative.

The term "disclose" has many meanings besides reveal for the first time. In legal language it means "set out;" "exhibit plainly," and in that sense a plea is said to disclose a defence; and in *Whiley v. Whiley* (a), decided on section 27 of The Common Law Procedure Act, 1852, it was held that the expression, "disclosing a good defence on the merits," meant setting out the facts in the affidavit. A similar construction has been put upon the term in The Bills of Exchange Act, 18 & 19 *Vict. c. 67. s. 2*. In none of these cases is the word disclose held to mean a setting forth of facts not previously known.

[BRAMWELL B.—Surely the word "disclose" must be a relative word. If the person to whom the statement is made does not know it before it is a disclosure to him.]

It is no doubt a relative term; and a discovery to *A.* of a fact known to *B.*, but not known to *A.*, is a disclosure to *A.*, though it would not have been so to *B.* Here the matter was not known to the creditors before, and even if known to them, it certainly was not known to the Commissioner. The enactment is, that the prisoner shall be protected if he discloses before the Commissioner; and it is clear

here that, as to the Commissioner, it was a disclosure or revealing of the facts for the first time.

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[CROMPTON J.—When you file a bill of discovery in Chancery, it is in respect of matters which you know pretty well before.]

Yes; and the bill must state the matters clearly; for it is an objection if the bill is what is called a fishing bill. Here the object of the provision in question is to assist the persons interested, and to induce the agent to make a full explanation by giving him the most ample indemnity, if he makes a true answer to all the questions put to him, whether the facts he so states were before known or not. The examination is a searching one, and the bankrupt may be forced to answer questions criminating himself, and his answers may be used against himself; *Regina v. Sloggett (a)*, *Regina v. Scott (b)*. If it be held that there is no disclosure in this case, it will be necessary on a criminal charge, where it is proposed to put in the examination of the prisoner before the Commissioner, to enter upon a collateral inquiry of great difficulty; namely, whether the matter was sufficiently known beforehand to prevent the examination being a disclosure. According to the suggested construction, an agent, who thought that he was revealing his fraud for the first time, would be deprived of the benefit of the statute if it were proved that some one else was previously acquainted with the transaction.

The construction which the Crown would adopt would paralyze the intention of the Legislature; and a fraudulent bankrupt would be deterred from making a discovery which it is the evident intent of the enactment to encourage.

Cur. adv. vult.

(a) Dears. C. C. 656.

(b) Dears. & Bell, C. C. 47.

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The Court differing in opinion, the following judgments were delivered on 5th *February*, 1859.

LORD CAMPBELL C. J.—The Judges who concur with me in the judgment I am about to deliver, are the Lord Chief Baron, and my brothers WIGHTMAN, MARTIN, WILLES, BRAMWELL, WATSON, CHANNELL and HILL.

On the 13th day of *July*, 1856, the two defendants were charged before a magistrate with the offence for which they were afterwards tried, under the 6th section of 5 & 6 *Vict. c. 39*. By the depositions of several witnesses on oath the charge was then clearly proved against them, and all the circumstances connected with the guilty act imputed to them were fully explained; accordingly they were duly committed for trial. On the 6th of *July* preceding they had been adjudged bankrupts, and on the 26th of the same month, while the prosecution was pending against them, being examined in the Court of Bankruptcy at the instance of a creditor, they made a statement to the same effect as the depositions before the magistrate, and amounting to a confession of their guilt. Very soon after, at the next meeting of the Central Criminal Court, an indictment for this offence was preferred, and found against them. The trial coming on before the Lord Chief Baron, they pleaded not guilty, and they were convicted on exactly the same evidence which had been given against them before the magistrate. When the prosecutor's case was closed, their depositions in the Court of Bankruptcy were tendered in evidence in bar of the prosecution, under the proviso to the section of the statute upon which the indictment was framed. It was objected, on the part of the Crown, that these depositions could not be admitted as a defence under the plea of not guilty; and that, at any rate, they

did not amount to any defence. The Lord Chief Baron admitted the depositions, intimated his opinion that they did not constitute a defence, and reserved these questions for the opinion of this Court. If the depositions could be at all available, I think that they might have been admitted under the plea of not guilty, and that they were tendered in evidence at the proper time, when it could be distinctly seen what was the *corpus delicti* relied upon, and a comparison could be made between the depositions before the magistrate, the depositions in the Court of Bankruptcy, and the evidence adduced at the trial, so as to ascertain whether there had been a disclosure within the meaning of the proviso. But I am of opinion that the depositions did not entitle the defendants to an acquittal. This question depends upon the sense in which the word "disclose" is used in the proviso to the 6th section of this statute. If by "disclosing the act" is meant merely stating the guilty act and confessing it, whatever may be the previous state of knowledge of the creditors, or of the Commissioner of bankruptcy, and whatever means of proving the guilty act may exist, and whatever steps may have been taken, and may be pending for prosecuting and punishing the offender, and although the statement or confession may be made while the grand jury are hearing evidence in support of the indictment, this conviction ought to be quashed. But, according to *Dr. Johnson*, "disclose" may mean "to uncover; to produce from a state of latitancy to open view; to reveal; to impart what is secret." According to *Richardson* (whose authority I much respect), "disclose" is "to uncover, or discover; to reveal; to open; to make known; to tell that which has been kept concealed." Where by the use of clear and unequivocal language, capable only of one construction, any thing

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is enacted by the Legislature, we must enforce it, although, in our own opinion, it may be absurd or mischievous. But, if the language employed admit of two constructions, and according to one of them the enactment would be absurd and mischievous, and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the Legislature intended. Where an agent who has abused the confidence reposed in him, and fraudulently made away with property with which he was intrusted, reveals what was before unknown, or incapable of proof, it may be well that for the information and advantage obtained by his confession, he should be indemnified against the penal consequences of his misconduct, which without his confession could not have been proved. But can it be supposed that the Legislature intended wantonly to extend the indemnity to cases where there is no merit whatever in the accused, where he states only what he knows to be already notorious, and where neither civil nor criminal justice can be at all advanced by the alleged disclosure? Would it not be a flagrant perversion of justice if a detected delinquent, of whose guilt there is abundant evidence, possibly by a previous voluntary confession, were enabled, after the charge has been made and judicially proved, and when a bill of indictment has been prepared, and is to be preferred against him at the next meeting of the proper criminal court before which he can be tried, to procure a friendly creditor to summon him into the Court of Bankruptcy, and if by there making or repeating the confession of his guilt, he might set his prosecutor at defiance and escape with impunity? In the present case when the defendants were examined in the Court of Bankruptcy there was neither uncovering, nor discovering, nor revealing, nor imparting of what

was secret, nor telling that which had been kept concealed. Neither for civil nor criminating purposes was the slightest advantage obtained by the alleged disclosure. Without it an action might have been maintained for the conversion of the bill of lading. Without making the slightest use of it, the defendants were actually convicted of the misdemeanor. A difficulty was presented by the counsel for the defendants by supposing a case where the fraudulent agent, at the time of his examination in the Court of Bankruptcy, may have reason to think, and may believe, that he is disclosing what was before unknown, and may be deprived of his indemnity by proof of previous knowledge, and means of proof in the possession of others. If he really believed that he was making a discovery, and enabling his principal to obtain justice, I should be strongly inclined to think that this would be a disclosure of the fraudulent act within the meaning of the proviso. But in the present case the defendants, when examined in the Court of Bankruptcy, knew full well that they were making no discovery; for they were present before the magistrate when the depositions against them were taken, those depositions were all read over to them, when they were asked if they then wished to say anything in answer to the charge, and they must have been fully aware that their statement was only a repetition of what had been before sworn against them when they were committed for trial. It is highly proper, in construing this Act of Parliament, that we should look to see in what sense the word "disclose" is used in other Acts of Parliament; and we find it in 52 *Geo. 3. c. 63. s. 5.*, and in 7 & 8 *Geo. 4. c. 29. s. 52.*, both of which are *in pari materia*. The object seems to be the same in all the three, they having regard to a civil remedy, and to criminal proceedings in cases of breach of trust

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by agents. The language employed is nearly the same in all the three; and I am of opinion that in all the three, for the same reasons, the word "disclose," admitting of the same construction, requires the same construction to be put upon it. There having been no judicial decision on the construction of these statutes, I do not see they can be of use to us, except to shew more strongly how justice might be defeated by now holding that a "disclosure" means confession of what the party confessing was well aware had been before made known, and had been before judicially proved. There is another set of statutes of a different description respecting bribery at parliamentary elections, in which the word "disclose" is to be found. The most recent of these is 15 & 16 *Vict. c. 57*. By section 9 of this statute, "no person shall be excused from answering any question on the ground of privilege, or on the ground that the answer to such question will tend to criminate such person;" and in return it is enacted, in the most express terms, that "every person who is examined as a witness, and gives evidence touching such corrupt practice, and who upon his examination makes a true discovery to the best of his knowledge touching all things to which he is examined, shall be freed from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable for anything done by such person in respect of such corrupt practice." Here it is quite clear that the most ample indemnity is held out to the person so examined if he makes a true answer to all the questions put to him, whether the facts he so states were before known or not. Section 10 goes on to enact, that the person so examined shall not be indemnified without a certificate from the Commissioners, "stating that such witness has upon

his examination made a true disclosure touching all things to which he has been so examined." But true disclosure here evidently means true statement, and the certificate required by the 10th section is merely that the witness has conformed to the duty cast upon him by the 9th section when examined upon the *voir dire*. The other statutes of this class admit of the same explanation; and the laudable objects of the Legislature in enacting them seem to be promoted by construing "disclosure," where used in these statutes, to mean "statement;" but to give the word "disclosure" the same meaning in the statute 5 & 6 *Vict. c. 39.*, which treats of a totally different subject, I think would be to contravene the intention of the Legislature, and to occasion great public mischief. For these reasons I am of opinion that in the present case there was no disclosure within the meaning of the proviso relied upon, and that the conviction ought to be affirmed.

COCKBURN C. J.—In common with my brothers WILLIAMS, CROMPTON, CROWDER and BYLES, who agree with me in the opinion I am about to deliver, I am unable to concur in the judgment which has just been pronounced by Lord CAMPBELL on behalf of the majority of the Court. I am of opinion that the defendants were entitled to be acquitted, as having disclosed on oath, on an examination before a Commissioner in bankruptcy, within the meaning of the protecting proviso of the 5 & 6 *Vict. c. 39.*, the matter for which they stood indicted as an offence against that statute. It is true, no doubt, that the transaction upon which the charge arose had not only become known, but had indeed become the subject-matter of prosecution, though not of indictment, against them at the time their evidence was given. On the other hand, it must be taken that the evidence was given

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on a compulsory examination, instituted *bonâ fide*, with a view to the interests of the creditors, and not to the protection of the defendants. I am of opinion that evidence given under the latter circumstances constitutes a "disclosure" within the meaning of the statute, and entitles the party giving it to the promised immunity, notwithstanding that publicity may have been previously given to the transaction, or that a prosecution may even have been commenced, if it has not advanced as far as indictment. In the consideration of this subject two questions appear to present themselves: first, whether the term "disclose" necessarily imports, *ex vi termini*, a particular meaning; secondly, if it does not, what meaning, upon a review of the statute in question and of others of a like nature, we ought to annex to it. On the first point we are told, on the authority of lexicographers, that the proper and general signification of the word "disclose" implies that the subject-matter of the communication is previously unknown, and that such therefore must be presumed to be the sense in which the term has been used in this statute. It may, I think, be admitted that such is the more ordinary meaning of the term; but, on the other hand, it is equally certain that the word is in numerous instances used simply in the sense of to "shew," to "set forth," to "state or declare," without the collateral idea of the subject-matter of the communication being before unknown. And it is important to observe that this is peculiarly the case in legal phraseology. In professional language the term is generally, I had almost said, and I believe I should be justified in saying, uniformly, so used. Thus we say, in common legal parlance, that a declaration discloses no cause of action, a plea no ground of defence, an affidavit no defence on the merits: in all which cases it is clear that the term is used in the more restricted sense contended for on behalf of the

defendants. In one view, indeed, it may be said that this use of the word is not inconsistent with the more extensive meaning; for even in this sense a thing may be said to be "disclosed" if it is made known for the first time as between the parties to the communication. A thing is not the less disclosed to *A.*, if made known to him for the first time, because it has been previously known to *B.* and *C.* Thus it would be perfectly appropriate language to say to *A.*, "I have discovered such and such a circumstance affecting the interest of *B.* and *C.* I shall disclose it first to *B.* and then to *C.*" So, that which is for the first time stated or made known in the course of a judicial proceeding may well be said to be disclosed to the Court, though it may have been known before to fifty persons. In like manner, the same term is applied in various Acts of Parliament relating to the law, as in the 27th section of The Common Law Procedure Act of 1852, relative to setting aside a judgment signed against a defendant on an affidavit "disclosing a defence on the merits;" and again, in The Bills of Exchange Act, 18 & 19 *Vict. c. 67. s. 2.*, where there is a provision in the same terms as to a defendant being let in to defend. And so restricted was the construction which some Judges were disposed to put on this term, that in a case which arose on the first of these statutes (*Warrington v. Leake (a)*), a majority of the Court of Exchequer decided that an affidavit, in which a defendant simply stated that he had a defence on the merits, was a sufficient disclosure of such a defence to satisfy the statute. And I have the authority of the Lord Chief Baron, certainly no mean authority in the matter of language, for saying that "the Legislature has made use of a word which does not necessarily convey more than the sense of telling (*b*)."

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(a) 11 Exch. 304.

(b) Ibid. 307.

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Still more strikingly to the purpose is the use of this term in a series of statutes (to which I shall have occasion to refer more particularly further on)—statutes of a cognate character to the one we are considering, inasmuch as, like the present, they afforded immunity to offenders as the price of the disclosure of crime. So far, therefore, as respects etymological authority, as derived from the legal sense and use of the term, it appears to me to be entirely in favour of the defendants. With regard to the construction of the statute, if I apprehend the argument aright, it is said, first, that the abuses which would arise from examinations before Commissioners in bankruptcy being instituted by friendly creditors for the frustration of criminal justice, if offenders about to be prosecuted could be thus protected, are sufficient to shew that the statutory protection could only apply to acts previously known to the offender alone, and by him for the first time revealed on his examination; secondly, that the Legislature could not have intended to afford immunity in respect of acts already known, and in respect of which prosecution and punishment were impending, so as to snatch, as it were, a criminal from the hands of justice. As regards the first argument, *ab inconvenienti*, I shall presently shew that the inconvenience apprehended would be far outweighed by difficulties of a still graver character arising from the opposite construction; but I must, in the first place, point out that the argument derived from this source is altogether inadmissible: for the statute we are now to expound is but one of a series of statutes passed *in pari materiâ*, in all of which this same protecting clause occurs, and in all of which the term “disclose” must have the same construction; but, in the earlier statute, the clause did not apply to evidence given before bankrupt

Commissioners at all. And if, as I shall presently endeavour to shew, the term "disclose," as used in the first and leading statute, had no reference to the novelty of the matter deposed to, it is too plain to be denied that no argument derived from inconveniences which may arise from the extension of the provision to examinations in bankruptcy can be admitted to vary the sense of the term as used in a provision common to both statutes. As regards the second part of the argument, it is, no doubt, a striking and a popular view of this statutory protection to say that it cannot have been intended that an opportunity of escaping should be afforded to offenders whose delinquencies have been already brought to light, simply because the parties aggrieved might find it desirable, for the protection of their private interests, to resort to the testimony of the guilty parties. I myself was at first greatly struck by this view; but, on a more careful and attentive survey of the Acts of Parliament, I have become persuaded that such view is erroneous. Some confusion appears to me to have arisen from considering the 5 & 6 *Vict. c. 39.* as an isolated statute, whereas, in fact, it is only one of a series of legislative enactments relating to fraudulent embezzlements by bankers and agents, in all of which the same protecting clause occurs. To a due appreciation of the subject it is necessary to pass these statutes in review. The first of them was the 52 *Geo. 3. c. 63.*, which for the first time made the embezzlement of securities by bankers, brokers or other agents an offence. Now, when this statute is attentively considered, it appears plain that the protecting clause was inserted for no other purpose than to enable the aggrieved party to obtain the full effect of those civil remedies, which, while it converted into an offence that which at the common law was only a fraud, the statute was

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most careful to secure to him. After creating the offence, the Act goes on to provide that any remedy which the party aggrieved might have had at law or equity shall not be impaired; and then immediately follows a proviso (as in the present statute) for protection to the offender as to any act "disclosed" by him on oath "under or in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding in or to which he shall have been a party, *bonâ fide* instituted by the party aggrieved." For this Act was afterwards substituted the 7 & 8 *Geo. 4. c. 29.*, which first provided for the case of factors pledging, for their own use, goods, or documents relating to goods, entrusted to them for sale. Here again occurs the protecting clause, but with two striking improvements on the corresponding clause of the preceding statute: first, in the omission of the provision that the suit or proceeding in which the evidence is given should be one to which the offender was a party, whereby the evidence of the delinquent was secured in cases in which, by fraud or collusion with the guilty agent, the securities or goods had got into the hands of third parties; and, secondly, by the extension, for the first time, of the protection to acts of which evidence was given before Commissioners in bankruptcy. This statute again was followed by the 5 & 6 *Vict. c. 39.*, the Act which we are now called upon to interpret, in which the protecting clause is in precisely the same terms as in 7 & 8 *Geo. 4. c. 29.* From this review of these Acts of Parliament, it seems to me that two consequences necessarily follow: first, that, these Acts being *in pari materiâ*, and the proviso the same in them all, whatever was the meaning of the term "disclose" in the first, such must be its meaning in the last; and, secondly, as already pointed out, that if upon a closer

consideration of the first of these statutes, the meaning should prove to be the narrower one, all the arguments *ab inconvenienti* derived from the supposed consequences arising upon examinations in bankruptcy must fall to the ground, seeing that the proviso of the first statute does not relate to disclosures made on examinations in bankruptcy at all. Now, as regards the first question, it appears to me only necessary to look at the provisions of the 52 *Geo. 3. c. 63.* to see at once that the word "disclosed," as there used, imports no more than a full statement by the witness of the matter in question. The Legislature, while it created the offence, seems to have intended to leave to the aggrieved party the option of proceeding criminally against the wrongdoer, or of enforcing his civil remedies against him. It was evidently most anxious to preserve to the injured party all his civil remedies intact. It even went out of its way to enact, unnecessarily (the offence created being only a misdemeanor), that the civil right and redress of the aggrieved party should not be merged in the offence. And inasmuch as the efficiency of the civil remedy would, in many instances, materially depend on the admission on oath of the offender, and as, in consequence of the matter now being made penal, the offender would be entitled to refuse to answer on the ground of his being privileged from criminating himself, the statute immediately went on to provide for the immunity of the respondent, thereby taking away, in effect, the privilege of silence, and securing the evidence to the aggrieved party. The succeeding statute removed the condition that the evidence should have been given in an action or suit to which the offender was a party; doubtless because it was found, as the fact is, that in the majority of instances the cases in which the evidence of the offender is required are those in which he is

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not a party to the suit; and doubtless for the purpose of securing the evidence in that numerous class of cases in which securities, goods, or documents may have got into the hands of third parties acting in concert and collusion with fraudulent agents or bailees. In like manner the protection was extended to examinations in bankruptcy, in order that bankrupts who had committed frauds of this nature, and agents who had embezzled the securities or goods of persons becoming bankrupt, might be subjected, for the benefit of a bankrupt's creditors, to the useful and searching ordeal of examination before Commissioners in bankruptcy. It appears, therefore, clear that the purpose of these protecting clauses was, as I have explained, to secure the evidence of the delinquents to the parties interested, by taking away the ground on which alone the privilege of silence could be claimed. At all events, the only alternative that can be suggested is that the object was to induce the offender to give evidence of the guilty transaction in the civil proceeding (evidence which on the hypothesis he was not otherwise bound to give), by insuring to him, as its price, protection against the possibility of prosecution and punishment. In any view of the subject, the object of the provision can have had reference to civil proceedings alone. It can have had none to the position of the offender simply as such. It never can have been intended to give immunity to the offender in respect of acts which it was the very object of the statute to visit with punishment, and solely for the purpose of obtaining a useless confession of his guilt. A review, therefore, of all this legislation seems clearly to establish that the purpose of the protection was simply to insure to the aggrieved party the admission or evidence of the delinquent in civil proceedings. But, if this be so, it is plain that the prior knowledge

or publicity of the facts elsewhere could have no bearing on the subject. It would avail the party requiring the evidence nothing that the transaction had been disclosed before. Yet if such prior disclosure were to operate as a bar to the protection, the obligation or the inducement to the witness to give the evidence would be at an end, and the purpose of the provision would be altogether frustrated. Nor is it any answer to the foregoing reasoning to say that, according to the decision of the majority of the Judges in *Regina v. Cross (a)*, bankrupts are compellable to answer, even though they may thereby criminate themselves. Assuming that decision to have settled the law, though there was a division of opinion among the Judges, and the case was not brought, as it might have been, before the full Court of Appeal, the obvious answer is that the protecting clause applies not only to bankrupts under examination (as seems to have been assumed on the opposite view of the question), but to other witnesses as well, and that the latter, unless they can be brought within the protecting clauses of the penal statutes relating to embezzlement, would not be bound to criminate themselves. It is matter of very frequent occurrence, as I have already observed, that third parties who in collusion with bankrupts, or in fraud of bankrupts, have been concerned in transactions which would come within these statutes are summoned for examination before commissioners in bankruptcy under the 33rd section of the Bankrupt Act. The examination of parties so circumstanced is often most essential to the interest of the creditors, which no doubt was the reason of the extension of the protecting clause to examinations in bankruptcy. But it is obvious that if the efficacy of the protecting clause is impaired by making the entire secrecy of the transaction deposed to the con-

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(a) Dears. & Bell, C. C. 68.

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dition of its application, the utility of such examinations will be reduced to nothing, as witnesses so circumstanced will, of course, decline to answer. Moreover, this difficulty applies, not only to examinations in bankruptcy, but to examinations occurring under any form of civil proceeding to which the aggrieved party may resort. And if the term disclosure is to be taken to import that the matter must be before unknown, where is the line to be drawn? Will communication to an associate, or a friend, or to an indifferent party, be sufficient to exclude? Or must it be a communication to a party interested? And, if so, will communication in cases of bankruptcy to a single creditor suffice to exclude, or must it be to the body of the creditors? Again, if knowledge of the transaction on the part of creditors will exclude, what degree of knowledge will suffice to do so? Must it be a knowledge of the entire transaction, and of all its particulars, or will it be sufficient if the transaction has been brought generally to the knowledge of others, while the particulars are left to be gathered from the examination of the party? If the latter, a bankrupt may be compelled to supply the defective links in the chain of evidence against himself, while he would be deprived of the immunity afforded by the Act. Moreover, in every case in which the existence of the transaction had become in anywise known, or even suspected or surmised, it would always be a question whether it had become sufficiently known to deprive the witness of his protection, and the Judge or Commissioner in bankruptcy, who would have to determine whether the witness was bound to answer, would have first to decide the preliminary question whether the circumstances amounted to a disclosure or not, without having the means of ascertaining whether the facts had become known elsewhere, and, if so, to what

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extent; and thus might very likely be called on to compel the witness to answer, where it would be his duty to protect him from unwillingly criminating himself. What answer is a Judge or Commissioner to make if appealed to, and told that the facts to which the witness is called upon to depose have been, in the whole or in part, made known to one or more individuals, in public or in private, clothed with authority to receive the statement or not, as the case may be? Into what innumerable difficulties would not such a rule lead in practice? Again, see the hardship upon a bankrupt against whom a prosecution is contemplated, or perhaps already set on foot. It may be that the evidence is inconclusive, or the witnesses open to suspicion. Is it nothing that the accused shall be compelled, though before another tribunal, to admit the facts, and that his admission shall go forth to the public, the effect of which will be that, even if his statement so made would not be evidence against him on his trial, yet by the publicity given to his avowal, the jury will be already prepared to believe the case against him? But, according to the authority of *Regina v. Cross (a)*, not only is a bankrupt compellable to answer, though in so doing he may criminate himself, but his admission may even be brought forward against him on a criminal prosecution. Is such a result consistent with the provision of a statute, which in creating the offence has expressly protected a party disclosing transactions which would otherwise fall within its enactments? No doubt cases will occur, as in the present instance, in which a conflict may arise between the interests of criminal justice and the civil rights which it was the intention of the statute to protect. This the Legislature seems itself to have anticipated, and to have itself drawn the line by fixing the time of indictment as the period after

(a) Dears. & Bell C. C. 68.

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which the evidence shall no longer carry protection with it. This, I think, plainly shews that the Legislature contemplated the possibility of the publicity of the transaction prior to the evidence being given. The guilty act must be known before an indictment would be preferred ; and, generally speaking, an examination before a magistrate would, as a matter of course, precede the indictment. Is it for us to abridge the period of protection which the Legislature itself has fixed? There is yet another consideration which, to my mind, is conclusive to shew that the construction put by the prosecution on the word "disclose" is not the true one. For this construction of the term would, as a necessary consequence, in the case of several co-delinquents, deprive all, except the one first examined, of the benefit of the protecting proviso. In the case of several partners, parties to an offence against the statute, all summoned for examination, all ready to disclose, the accidental circumstance that *A.* happens to be called before *B.* and *C.*, though all should give evidence as to the same transaction, would give to *A.* the preference of protection, while *B.* and *C.* would be excluded from it. The same thing would happen where the examination of one of the parties might make it appear expedient to subject the other to examination. In the case now under consideration, supposing all difficulty arising from the previous publicity of the facts had been out of the way, one only of the partners, namely, the one who claimed to be examined first, would be entitled to the protection of the statute, because, the fact having once been made known, it could not, according to this construction, be again "disclosed." The absurdity of the consequence is to my mind irresistibly conclusive against the validity of the premises from which it necessarily flows. I am

not insensible to the abuses which may be attempted by examining bankrupts before Commissioners in bankruptcy; but, independently of the observations I have before made as to the inapplicability of any argument founded thereon, I cannot but think the apprehended mischief is to be counteracted by rigorously insisting that the protection shall extend only to cases where the evidence is given on examinations instituted *bonâ fide* for the purpose of advancing the interest of the creditors. But, even if this were not so, these inconveniences appear to me to be greatly outweighed by the graver difficulties I have pointed out, and which would have the effect of frustrating the purposes for which the protection is afforded. If on a review of the statute the meaning of the term "disclose" should prove to be what I have suggested, and inconveniences should arise from its application to examinations in bankruptcy, the remedy must be found by fresh legislation, not by a distortion of the sense of the terms of existing enactments. I have lastly to advert to that class of statutes in which protection is afforded to delinquents on their giving evidence of criminal acts in which they have been implicated. In many of these the term "disclosure" or "discovery" (these words used in a synonymous sense) occurs. Thus, in the various acts for the appointment of commissions for inquiry into bribery, of which the Act of the 15 & 16 *Vict. c. 57. ss. 8., 9., 10.*, may be taken as an instance, protection is given to offenders making discovery or disclosure of criminal acts in evidence given before the Commissioners. Now these statutes, more especially the one just referred to, were all passed in consequence of so many instances of criminal acts having come to light that a more general inquiry became desirable. The acts to which a party would come to depose would all be known and notorious

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before the examination would take place; in a vast number of instances the same witnesses had previously been examined before committees of the House of Commons. Yet it never occurred, or could occur to any one, to suppose that the statement of the witness under the commission was not a discovery or disclosure within the protecting enactment, because the fact deposed to had been before openly stated by him or had been otherwise generally known. It never occurred to any one that if one of the parties to a corrupt act had given information, the other, if examined before the commissioners, would not be held to have made a disclosure. And, to make the case as analogous as possible to the present, let me ask what would be the effect if, prior to the issuing of such a commission, an action had been instituted for penalties, or a prosecution commenced against the offender? Could the purpose of the Act be frustrated by holding that there could be no disclosure under such circumstances? I apprehend, beyond all question, not. Again, in the Act for the suppression of gaming-houses, 17 & 18 *Vict. c. 38.*, a person taken on suspected premises may be compelled to give evidence as to acts of gaming, or as to the unlawful obstruction of the entrance of the officers; and, if he makes a true and faithful discovery, he becomes entitled to immunity. Yet in such a case the facts are notorious; there is no doubt that gaming has been going on; the obstruction to the entrance of the officers is indisputable; a prosecution is already commenced; what is wanted is legal evidence to prove facts of which no moral doubt exists; yet the Legislature treats the evidence given under such circumstances as a discovery entitling the witness to immunity. There are other statutes giving indemnity to offenders simply on their giving evidence of illegal acts to which such statutes

have reference, without the use of the term disclosure or discovery. Of this the Act 6 *Geo.* 4. *c.* 129. *s.* 6., the Act for the suppression of illegal combinations among workmen, is an instance. These acts appear to me most important, as shewing that the term "disclosure," as applicable to evidence given by offenders, is used by the Legislature without the consideration of the facts spoken to being previously unknown being involved in it; and, further, that where the production of such evidence is deemed desirable, the escape of the offender, even from a pending prosecution, is not deemed a bar to its being obtained by immunity to the offender. Looking, therefore, to the use of the term in question in legal language, and in statutory enactments relating to the general administration of the law, and more particularly to purposes similar and analogous to the present, and looking also to the purposes of the present enactment, and the effect of the construction of the word "disclose" with reference to such purposes, I am irresistibly led to the conclusion that the true meaning of the term as it occurs in this statute is the restricted one which attaches to it in all these numerous instances; and that, consequently, the defendants have sufficiently disclosed the offence with which they stand charged, and are therefore entitled to our judgment.

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LORD CAMPBELL C. J.—I by no means wish to offer anything by way of reply upon the judgment we have just heard read by the Lord Chief Justice; but, by way of explanation, I wish to make the single observation that I myself, and my brethren who have agreed with me, are of opinion that the word "disclose" may admit of two interpretations, the discovery of what was not before known, and a statement of that which was before known; and we are only to

1859. look in each Act of Parliament to see in which sense
SKEEN'S it is used by the Legislature, knowing that in one set
Case. of statutes it is used in one sense, and in another
sense in other statutes.

POLLOCK C. B.—I concur entirely in the judgment of Lord CAMPBELL. I wish to make only one observation upon the subject. There is no word in the *English* language which does not admit of various interpretations. It is no doubt frequently found that the imperfection of language leads to litigation on the construction of statutes and the meaning of terms. When we have to consider what is the meaning of a statute, and the sense in which a word is used, we must look at the intention of the Legislature. I own it appears to me that if we were to construe the word “disclose” in this statute as merely “to state,” however much the matter disclosed might have been prevalent and universally notorious before, we should entirely defeat the object of the Legislature. On the other hand, in my opinion, the intention of the Legislature being to punish crime, if we put the interpretation upon the word disclose of making known for the first time, there still will arise those considerations which occur in judicial inquiries under any circumstances. It may well be that a statement by an agent would be a disclosure within the Act, though the matter was known to some persons, as, for instance, to a clerk, or to a partner in a bank, with whom a document had been fraudulently deposited. But the ground on which I concur with my Lord CAMPBELL is shortly this:—I am of opinion clearly that an Act of Parliament which is directed against crime must have been intended to be effectual; and I think the interests of the public in the punishment of crime were far more within the view of the Legislature than the possible interests of creditors under a commission, or a creditor against a

debtor, and I think if we were to construe the word "disclose" in the sense contended for by the prisoners' counsel, we should, in effect, repeal the Act of Parliament, on the language of which we are bound to put that construction which will make it effectual, and not that which will make it abortive.

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Conviction affirmed.

REGINA v. THE INHABITANTS OF THE
PARISH OF EAST HAGBOURNE.

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THE following case was reserved at the Summer Assizes, 1858, for the county of *Berks*, by BYLES J.

The indictment charged the defendants with the non-repair of a public carriage road in the parish of *East Hagbourne*, called the *Coscot* and *Didcot* road, branching out of a public road called the *Coscot* and *Wantage* road, near *Coscot Cross*, and leading into the *Wallingford* and *Farringdon* turnpike road.

The defendants pleaded that they were not guilty. The facts, so far as they are material to the question of law reserved, are these.

The road indicted, called the *Coscot* and *Didcot* road, was an ancient public highway within the parish leading from the *Coscot* and *Wantage* public road on

Upon an indictment for the non-repair of a public carriage road, it appeared that the road was an ancient highway; that eighteen years ago the indicted parish, wherein the road was situate, was inclosed under 6 & 7 Wm. 4. c. 115., which incorporates the General Inclosure Act,

41 Geo. 3. c. 109.; and the road was described in the award. Before the award the Commissioners made an alteration in the original road by straightening and widening it, but the whole of the original road was comprehended in the existing road as set out in the award. Both before and since the award the parish had repaired it, but no steps had been taken by the Commissioners for putting the road into complete repair; there never was any declaration by justices that it had been fully completed and repaired, and no proceedings had been taken under section 23 of 5 & 6 Wm. 4. c. 50. It passed through allotable land on both sides except that a small portion on one side was an old inclosure.

Held, that the parish was not liable to repair the road.

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the South, also within the parish, to the *Wallingford* and *Farringdon* turnpike road towards the North. Other roads, nearly opposite the communication of the indicted road with these two roads, branch off from these roads respectively. The road which branches off from the *Coscot* and *Wantage* public road on the South is entirely, as to part of its length, in the indicted parish.

In the year 1840 the parish of *East Hagbourne* was enclosed under the provisions of the public general Act 6 & 7 Wm. 4. c. 115., which Act incorporates, by section 52, the provisions of the General Inclosure Act, 41 Geo. 3. c. 109.

The inclosure award was published on the 14th June, 1840.

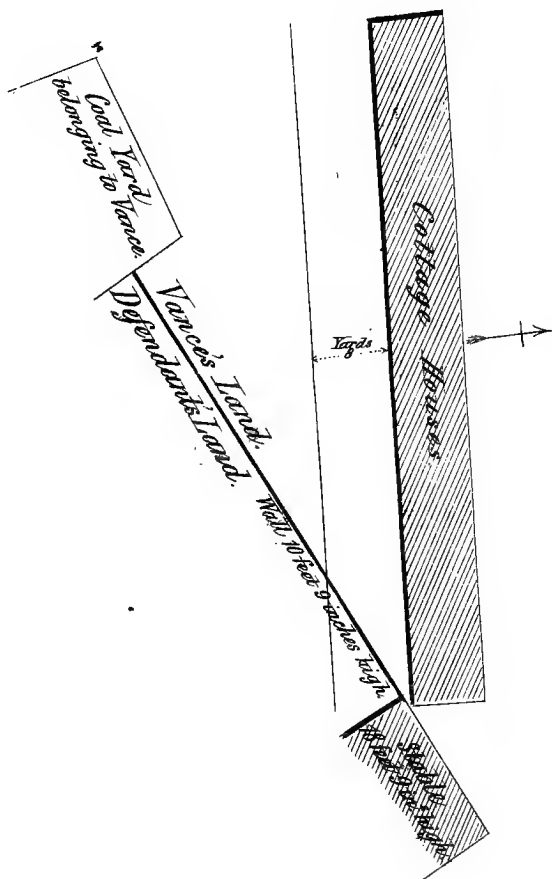
Under the heading "public carriage roads and highways," the award thus describes the road in question.

No. 2. *Coscot and Didcot* road. One public carriage road and highway of the width of thirty feet, branching out of the public carriage road called the *Coscot* and *Wantage* road, at or near *Coscot Cross*, and thence in or near its present track by the West end of the parish into the *Wantage* and *Wallingford* turnpike road.

All the other public roads in the parish are described by the award in the same manner.

The Inclosure Commissioners had before the award made some alteration in the original *Coscot* and *Didcot* road by straightening and widening it; but the whole of the original road is comprehended within the existing road as set out in the award and described in the indictment

The public can go from the point where the indicted road leaves the *Coscot* and *Wantage* road to the point where it reaches the *Wallingford* and *Farringdon* road



by another road, called the *New Road*, which is an ancient public road, but the distance is nearly three times as great.

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It is admitted by the defendants that the road indicted is a public road; that the indicted parish has repaired it both before and after the award, and that at the time of indictment found it was out of repair.

It is admitted by the prosecution that no steps were taken by the Commissioners for putting the road into complete repair (see 41 *Geo. 3. c. 109. ss. 8., 9.*), unless the contrary must be inferred from the foregoing extract from the award; that there never was any declaration by justices at their Special Sessions that the road had been fully and sufficiently formed, completed and repaired; and that no proceedings had been taken under 5 & 6 *Wm. 4. c. 50. s. 23.*

The indicted road passed through allotable land on both sides of it, except that *Hagbourne Park*, which is on a small portion of the East side of the road, is an old inclosure.

So much of the plan annexed to the award as shews the indicted road and the roads referred to in the above statement is to form part of the case.

The defendants objected that the proviso in the 41 *Geo. 3. c. 109. s. 9.* applied to roads continued by the award, as well as to roads newly made under it; and that, as the road in question has not been by justices at their Special Sessions declared to be formed, completed or repaired, the parish were not at present chargeable with the non-repair. They cited *Regina v. Hatfield (a)*.

The prosecutors insisted that the defendants were liable, and cited *Regina v. Cricklade (b)*. They further insisted that the road in question was a prolongation of old public roads in the parish, beyond the limits of

(a) 4 Ad. & E. 156.

(b) 14 Q. B. Rep. 735.

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the inclosure (see *Thackrah v. Seymour (a)*); and that the defendants, by repairing since the award, had waived any objection, and admitted their liability.

I reserved the objection for the opinion of the Court, and subject thereto advised the jury to find a verdict for the Crown.

J. BARNARD BYLES.

This case was argued, on 20th *November*, 1858, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., BYLES J. and HILL J.

Cripps (*Henry James* with him) appeared for the Crown; and *Gray* (*G. Francis* with him) for the defendants.

Gray, for the defendants.—The inclosure in this case took place subsequent to the General Highway Act, 5 & 6 *Wm.* 4. c. 50., but the case finds that no proceedings have taken place with regard to the road in question under section 23 of that statute; and therefore, so far as any obligation to repair is thrown upon a parish by that Act, the defendants are exempt. The question will turn upon the provisions of the General Inclosure Act, 41 *Geo.* 3. c. 109. ss. 8., 9. Section 8 requires the Commissioners in the first place, before proceeding to make any allotments, to set out and appoint public carriage roads and highways over the lands intended to be allotted and inclosed, with a proviso that in case they be empowered to stop up any old road, passing through any part of old inclosures, the same shall not be done without the concurrence and order of two justices. By section 9, on which the question more particularly depends, the Commissioners are to provide for the first forming and completing of such parts of the carriage roads to be set out as shall be newly made, and for putting into

(a) 1 Cr. & M. 18.

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complete repair such part of the same as shall have been previously made. It then provides that the surveyor's salary, and the expence of such completing and repairing, shall be raised in the same manner as the charges of obtaining the special Act shall by such special Act be directed to be raised. The surveyor is to be subject to the control of the justices; and, in case such surveyor shall neglect to complete and repair such roads within two years after the award, unless a further time, not exceeding one year, be allowed by justices, he is to forfeit 20*l.*; and, lastly, it is enacted that the parish shall be in nowise charged or chargeable towards forming or repairing the said roads respectively till such time as the same shall, by such justices in their Special Sessions, be declared to be fully and sufficiently formed, completed and repaired, from which time, and for ever thereafter, the same shall be supported and kept in repair by such persons and in the like manner as the other public roads within such parish, township or place are by law to be amended and kept in repair.

It is admitted that, before the inclosure, this was an ancient highway which the Commissioners widened and straightened, and that both before and since the award it has been repaired by the parish; but it is contended that, though it is still a public highway and not a new highway, the Commissioners having set it out and described it by their award, the parish is not bound to repair because the provisions of the 9th section have not been complied with. The justices have not declared the road to be "sufficiently formed, completed and repaired" as the Act requires, and therefore the parish is not liable. The case of *Regina v. Hatfield* (a) is clearly and expressly in point. There it was held that, under section 9 of 41 *Geo.* 3. c. 109., a road continued, as well as a road newly

(a) 4 Ad. & E. 156.

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made, under an award, must by justices in Special Sessions be declared to be fully completed and repaired before the inhabitants of the district can be indicted for not repairing it.

BYLES J.—If not repairable by the parish, where are the funds for the repairs to come from? The inclosure was made eighteen years ago. The commission has expired, and the funds from that source are exhausted.

Gray.—The same difficulty existed in *Regina v. Hatfield*, but did not prevail.

HILL J.—The parish having repaired the road since the award, can it now set up the want of the declaration of the justices?

Gray.—It is submitted that it can. The case of *Regina v. Cricklade (a)*, which may be cited on the other side, was the case of a bridle road, and the question was whether it had been stopped. There the special Act, incorporating the General Inclosure Act, authorized the Commissioners to stop up and alter ways and set out new ways. They ordered the common to be inclosed, and set out a road thirty feet wide with the same termini and in the same line as an old bridle way; and directed that it should be a public bridle way, and a private carriage way for certain persons who should keep it in repair; and the Court of Queen's Bench held that the old public way was never effectually stopped, and that the parish were still liable to repair it as a bridle road. The same question does not arise here, and that case is not in point. In this case the liability of the parish could not commence till the certificate was given.

Cripps, for the Crown.—The facts of this case are different from those in *Regina v. Hatfield* or any other decided case bearing upon the point in question. In *Regina v. Hatfield* there was not, as there is here,

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evidence of the parish having done repairs subsequent to the inclosure. Here, by repairing, the parish waived the necessity for the certificate. The road was both before and after the inclosure repaired by the parish.

BYLES J.—It was agreed between the counsel at the trial that the road had been repaired both before the inclosure and since.

WIGHTMAN J.—What should you have said supposing there had been no evidence of repairs?

Cripps.—That the parish cannot defend itself under section 9, as it does not appear that any surveyor was appointed, and the appointment of a surveyor is required to enable the justices to certify, and is a condition precedent to the cessation of the liability on the part of the parish. That construction of the statute is to be adopted which, in giving effect to the statute, guards the rights of the public. As it cannot be pretended that this ancient road has been stopped (*Regina v. Cricklade*), it is still a public highway, and the defendants, by repairing, have waived the necessity for the certificate. At all events, the whole of the requirements of section 9 not having been complied with, the enactment of that section does not shield the parish from liability.

Gray, in reply.—With regard to the appointment of the surveyor, the statute provides that he is to be appointed by the Commissioners; and, if there was any neglect on their part in not appointing one, the parish is not to be held responsible.

Cur. adv. vult.

On 5th *February*, 1859, the judgment of the Court was delivered by

POLLOCK C. B.—We are of opinion that this conviction was wrong.

Conviction quashed.

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REGINA v. ALEXANDER RICHMOND.

The prisoner was convicted on an indictment, under section 57 of 9 & 10 Vict. c. 95., for acting and professing to act under a false colour and pretence of the process of the County Court of S.

It appeared that the prisoner, being a creditor of *B.*, obtained a blank form for plaintiff's instructions for summons, and filled it up with particulars of the names and addresses of himself and *B.* as plaintiff and defendant, and of the nature and amount of the claim. He without authority signed the form with the name of the Registrar of the Court, and indorsed a notice (which he also without

THE following case was reserved by WATSON B.

The prisoner was tried before me at the Spring *Somersetshire* Assizes, 1859, for an offence under the County Court Act, 9 & 10 Vict. c. 95. s. 57., in several counts, for acting and professing to act under false colour and pretence of process of the County Court of *Somersetshire*. The prisoner had obtained blank forms for the plaintiff's instructions to issue County Court Summons, one of which he filled up, and without any authority, signed it, "*William Giles*, Registrar of the *Taunton* Court" (original annexed). On the back the prisoner wrote:

"Unless the whole amount claimed by *Alexander Richmond*, draper, of *Taunton*, is paid on *Saturday*, an execution warrant will be immediately issued against you.

"Witness }
"my signature }

"*William Giles*."

The registrar of the Court is named *William Giles*. The signatures on the face and on the back were forgeries.

This document the prisoner inclosed in an envelope, and sent it by post to *Thomas Snooks* (the person inserted as defendant in the form), at *Creech St. Michael*. The sum of 9s. 6d. was due from *Thomas Snooks* to the prisoner. The document was sent to *Thomas Snooks* to obtain payment of the said sum. *Snooks's* wife went with the document (on receiving the same)

authority signed with such name), that unless *B.* paid the amount by a certain day an execution warrant would issue. This form so filled up and signed he sent by post to *B.* with intent thereby to obtain payment of his debt.

Held, by COCKBURN C. J., ERLE J., CROMPTON J. and WATSON B. (BRAMWELL B. *dubitante*), that these facts constituted an acting and professing to act under the false colour or pretence of the process of the County Court, and that the conviction was right.

to Mr. *Giles*, the registrar, to pay the money, who refused to receive it; and Mr. *Giles*, saw the prisoner and charged him with the offence, who confessed his guilt in having so written and sent this document.

The words "By authority" printed on the document referred to the form being issued by the authority of the authorities in *London*.

It was contended, on the part of the prisoner, that this was not an offence within the above provision, and the case of *The Queen v. Evans (a)*, and particularly an observation of Lord CAMPBELL in delivering his judgment, were cited. I reserved the point for the consideration of the Court of Criminal Appeal, and admitted the prisoner to bail W. H. WATSON.

The following is the form referred to in the case.

No. 112.—Plaintiff's Instructions.

By Authority.—BARNICOTT, Printer, Taunton.

No. of Complaint, T. 568.

COUNTY COURT OF SOMERSETSHIRE, AT TAUNTON.

Plaintiff's Name in full.	} <i>Alexander Richmond,</i> for <i>Mr. A. Carmichael, Exeter.</i>
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Plaintiff's Residence and Occupation.	} <i>East Reach, Taunton, Draper.</i>
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Defendant's Name in full.	} <i>Thomas Snooks.</i>
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Defendant's Residence and Occupation.	} <i>Creech St. Michael, Labourer.</i>
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Amount claimed.	£	s.	d.
	„	9	6

Nature of Claim.	<i>Goods sold and delivered.</i>
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Dated	<i>6 September, 1858.</i>
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Signed	<i>William Giles, Register of the Taunton Court.</i>
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Case.

At the back of this form the prisoner had written the words mentioned in the case.

This case was argued, on 30th *April*, 1859, before COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON B.

F. Edwards appeared for the Crown; no counsel appeared for the prisoner.

F. Edwards, for the Crown.—This case depends upon the authority of *Regina v. Evans* (a). By section 57 of 9 & 10 *Vict. c. 95.*, on which this indictment is framed, it is enacted: that “every person who shall forge the seal or any process of the Court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person, any paper falsely purporting to be a copy of any summons or other process of the said Court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said Court, shall be guilty of felony.”

WATSON B.—I reserved the case in consequence of the counsel for the prisoner bringing to my notice an observation of Lord CAMPBELL, in *Regina v. Evans*, to the effect that the mere sending the letter in that case would not have been acting under colour of process.

COCKBURN C. J.—We all think that the judgment below should be affirmed.

CROMPTON J.—The offence proved is certainly a professing to act under a colourable process of the Court.

BRAMWELL B.—I consider myself bound by the authority of *Regina v. Evans* (b), as being a prior decision

(a) Dears. & Bell's C. C. 236.
See also *Regina v. Castle*, *Ib.* 363.

WELL B., in *Regina v. Evans*, is that the words “who shall act or profess to act under any false colour

(b) The reason given by BRAM-

of this Court; but at the same time I do not wish it to be understood that I agree with the decision there given.

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Case.

Conviction affirmed.

or pretence of the process of the Court," imply an acting under a genuine document by a false colour or pretence.


REGINA v. JOHN SMITH SUNLEY.

1859.

THE following case was reserved by the Recorder of *Portsmouth*.

The prisoner was tried before me at the last Quarter Sessions for the borough of *Portsmouth*, upon the following indictment, framed under the provisions of 9 & 10 Wm. 3. c. 41.

Borough of *Portsmouth*.] The jurors of our lady the Queen upon their oath present that *John Smith Sunley* late of the parish of *Portsea* in the borough of *Portsmouth* in the county of *Southampton* labourer on the 28th day of *August* in the year of our Lord 1858 with force and arms in the parish aforesaid in the borough aforesaid in the said county unlawfully had in the custody possession and keeping of him the said *John Smith Sunley* certain naval stores marked with

The prisoner was convicted on an indictment, under 9 & 10 Wm. 3. c. 41. s. 2., charging him with having illegally had in his custody, possession and keeping, naval stores marked with the broad arrow. It appeared by the evidence that bags marked M, with their contents, addressed to G., an officer of *The London and South*

Western Railway Company at *Nine Elms*, were taken by two females to the *Portsmouth* Station and duly forwarded to *London* by railway, and deposited in the goods department of the railway at *Nine Elms, London*, where G. acted as officer. The prisoner, a marine store dealer at *Portsmouth*, wrote and telegraphed to an officer of the railway Company to deliver the bags to Mr. *Emmanuel*. This was not done, but a letter written by G., stating "there are several bags lying at this station, consigned by you to me, marked M, to whom are they to be delivered?" was shewn to the prisoner by a clerk in the railway office, and the prisoner, in reply, directed the clerk to telegraph to "deliver to *Emmanuel* as before." The bags, in consequence of information, were opened at the goods department, and were found to contain naval stores marked with the broad arrow. Bags had been previously forwarded in a similar manner by the railway to the goods department of the Company in *London*, marked E, which the prisoner had ordered to be delivered to *Emmanuel*.—*Held*, that there was evidence to support the conviction.

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the mark usually used to and marked upon such like naval stores of our said lady the Queen that is to say 20 pounds weight of copper nails each of the said nails being stamped and marked with the broad arrow 30 pounds weight of mixed metal nails each of the said mixed metal nails being stamped and marked with the broad arrow 50 pounds weight of pieces of copper each of the said pieces of copper being stamped and marked with the broad arrow and 50 pounds weight of pieces of mixed metal each of the said pieces of mixed metal being stamped and marked with the broad arrow which said naval stores so stamped and marked as aforesaid were then and there found in the custody possession and keeping of him the said *John Smith Sunley* he the said *John Smith Sunley* not being a contractor with the principal officers or commissioners of our said lady the Queen of the Navy Ordnance or Victuallers for the use of our said lady the Queen or employed by any contractor with the principal officers or Commissioners of our said lady the Queen of the Navy Ordnance or Victuallers for the use of our said lady the Queen and he the said *John Smith Sunley* not being a contractor with the Commissioners for executing the office of Lord Admiral of the United Kingdom of *Great Britain and Ireland* for the use of our said lady the Queen or employed by any contractor with the said last mentioned Commissioners for the use of our said lady the Queen to make any stores of war or naval stores whatever, to the diminution of the naval stores of our said lady the Queen against the form of the statute in such case made and provided against the peace of our lady the Queen her crown and dignity.

The following facts and documents were proved.

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The prisoner was a dealer in marine stores carrying on business at *Portsmouth*. On the 27th *August*, 1858, several bags marked with the letter M, and addressed to "Mr. *Godson*, *Nine Elms Station*," were brought to the *Landport Station* at *Portsmouth* of *The London and South Western Railway* by two women, and were dispatched by the train to *London*. They arrived safely, and in the same condition in which they were dispatched from *Portsmouth*, at the *Nine Elms Station*, where they were unloaded and deposited in the goods department of *The London and South Western Railway* at that station. Bags similarly addressed, but marked with the letter E, had several times before been sent in a similar manner from *Portsmouth* to *London*.

The following paper was written by the prisoner at the *Nine Elms Station* some time before any bags addressed to Mr. *Godson*, and marked with the letter E, had been received there.

"Goods marked E always deliver to the order of A. *Emmanuel*, 51, *Marylebone Lane*."

On the 25th *August*, 1858, the following letter in the handwriting of the prisoner was received by Mr. *Godson* at the *Nine Elms Station* through the post.

"Mr. *Godson*, Sir, please to deliver goods marked M to Mr. *Emmanuel*, and oblige, yours respectfully,

"J. S. *Sunley*."

On the 1st of *September*, 1858, the prisoner came to the goods department of the *Landport Station* at *Portsmouth*, belonging to *The London and South Western Railway*, and saw there the clerk of the goods department. He produced to the clerk the following letter written for Mr. *Godson*, and at his desire, by Mr. *Scott*, the chief clerk at the *Nine Elms Station*.

1859.

SUNLEY'S
Case.“*London and South Western Railway.*“Superintendent’s Office, *Nine Elms* (S),“*London, August 31st, 1858.*

“Dear Sir,—There are several bags lying at this station consigned by you to me and marked M. To whom are they to be delivered or forwarded?

“Mr. *Emmanuel* has applied for goods from you lying to his order, but as I am not aware he is entitled to these bags, I have declined to deliver until I am advised who is the real owner. Yours obediently,

“*W. F. Godson, pp. S. W. R.*

“Mr. *Sunley*, 26, *Plymouth Street, Southsea.*”

Indorsed on the back of this in pencil, in the prisoner’s handwriting, were these words.

“Sir. Mr. *Mountain*. Please telegraph to deliver M to Mr. *Emmanuel* as before, and oblige. Yours *J. S. Sunley.*”

The prisoner had also with him another paper written, which he shewed to the clerk, on which were the following words in his own handwriting.

“To Mr. *Godson*.—All the goods lying at the station marked M to be delivered to *Emmanuel* as previously advised. Advise *Emmanuel* on receipt of this, with instructions to remit by return of post. To *M. E. C.*

“Please to apply for goods and remit on account.”

On the back of his second paper were written also in the prisoner’s handwriting the following words.

“I have been expecting the cash, and Mr. *Godson*’s forgetfulness or oversight has inconvenienced me much. Should it prove my fault I will pay ; if not, I expect not to pay. Yours respectfully, *J. S. Sunley.*”

He requested the clerk to telegraph to *London* to Mr. *Godson* the words written on the face of his second

paper and set out above. The clerk refused to telegraph the whole message, but did telegraph as follows to Mr. *Godson*.

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"Please to deliver the bags of goods marked M to Mr. *Emmanuel*."

The following letter in the prisoner's handwriting was received on the 2nd of *September* through the post by Mr. *Godson*.

"26, *Plymouth Street, Southsea*,
"Sept. 1, 1858.

"Mr. *Godson*, Sir, I wrote you to deliver goods marked M to Mr. *Emmanuel*; this I expected to stand until further orders instead of keeping them at *Nine Elms*. I had a *strong* reason for changing the letter, and may have again some day; but always continue to deliver the last instructions in future. I shall have no more goods for *B. & Co.*, as they are bankrupts, and dressed me in 100*l.* I forwarded a parcel last week to *Jackson, Leeds*; he writes not received yesterday.

"Yours respy. *J. S. Sunley*."

The bags, in consequence of information as to their contents, were opened and examined at *Nine Elms*, and found to contain a quantity of naval stores marked with the broad arrow. The jury found the prisoner guilty, and I sentenced him to six months imprisonment. I reserved, for the consideration of the Justices of the Queen's Bench and Common Pleas and the Barons of the Exchequer, the question: Whether there was any evidence of the naval stores having been found in the custody, possession or keeping of the prisoner within the meaning of the 9 & 10 *Wm. 3. c. 41. s. 2.* and I now humbly request their opinion thereon.

If they should be of opinion that there was no

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evidence of such finding the conviction is to be quashed, otherwise it is to be affirmed.

J. D. Coleridge,
Recorder of *Portsmouth*.

This case was considered, on 30th *April*, 1859, by COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON B.

Poulden appeared for the Crown, but was not called upon by the Court.

No counsel appeared for the prisoner.

COCKBURN C. J.—We are all agreed that in this case the judgment must be affirmed.

Conviction affirmed.

See also for 1859, 576 & 578

1859.

REGINA v. HENRY AVERY and WILLIAM
HENRY AVERY.

SC 8CnoCrcas 187

A. and B. took the goods of a husband without his consent, and with the intent to deprive him absolutely of his property in them; but the taking was in the

presence and with the consent and privity of the wife.

Henry Avery and *William Henry Avery* were tried before me at the Quarter Sessions, holden at *Dymchurch*, for the liberty of *Romney Marsh*, in *Kent*, on the 9th of *April*, 1859. The indictment charged them with stealing a carpet, a feather-bed, boxes, baskets, and a quantity of wearing apparel, the pro-

A. and B. were uncle and cousin of the wife, who at the time of the taking intended to leave, and afterwards left, her husband's house without the intention of returning, and went with one of the prisoners to the house of the other; but there was no evidence that she had committed or intended to commit adultery with either of them.

It was not left to the jury to say which was the principal in taking the goods, the wife, or *A. and B.*, or either of them.

Held, that it must be considered that the wife took the goods, and *A. and B.* assisted, and that they were not guilty of larceny.

perty of the prosecutor, from his dwelling-house. The prosecutor was a labouring man living with his wife. The prisoner *Henry* was uncle, and *William Henry* was cousin, to the wife. The prisoners came together on the night of the 7th of *February*, and again on the night of the 10th, to the prosecutor's house without his knowledge, and after he had gone to bed ; the wife was at home on each occasion and admitted them. On the first night they packed and took away, in the wife's presence, and with her privity and consent, a box containing property of the prosecutor, and on the second night they took, in her presence, and with her privity and consent, a carpet and a large iron cooking pot. On the morning of the 11th, after the prosecutor, who was in the habit of leaving home early, had gone to his work, the prisoner *William Henry Avery* went to the prosecutor's house between 8 and 9 o'clock, and, with the wife's privity and consent, carried away the bed, and placed it in a granary at a short distance, requesting the person who gave him permission so to do that the prosecutor should not be informed of it. *William Henry Avery* then returned to the prosecutor's house, and shortly after went away with the wife, *William Henry Avery* taking with him a basket containing property of the prosecutor. The wife left her husband's house without his knowledge or assent, and without the intention of returning ; they went together to the house of *Henry Avery*, the other prisoner, a distance of about three miles. The prosecutor was informed on the same *Friday* that his wife and goods were gone, and he went that evening with the constable to *Henry Avery's* house ; *Henry Avery* was at home, and being asked denied that he had any property of the prosecutor's, or any thing in the house that was not his own ; on which the house was searched, and a milk jug of

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the prosecutor's was found in the bedroom, concealed between the bed and the sacking of the bed, and also in the same room several other articles belonging to the prosecutor. In a room in an adjoining house, where *Henry Avery* by permission had placed some of the property, of which room he produced the key after a denial by him that he had it, were found two boxes containing wearing apparel, and the carpet, a counterpane, and other things, the property of the prosecutor. The boxes belonged to the prosecutor, and had the following address upon them in the writing of *William Henry Avery*: "*Henry Avery, to be left at the Rose Inn, Folkstone,*" with the additional words "*By Sharwood,*" on one of them. The bed was found in the granary, where the prisoner *William Henry Avery* had placed it. All the articles found in the prisoner *Henry Avery's* house, as also those in the room of the adjoining house, and in the granary, were the prosecutor's property, and were taken on one or other of the occasions mentioned. There was no evidence to shew that the wife remained at *Henry Avery's* house, nor that she had committed adultery with either of the prisoners, or intended to do so. She was not called as a witness. It was contended by the counsel for the prisoners that, to make them guilty of felony, there must be either an adultery committed or an elopement by the wife with intent to live in adultery with one of them, or with somebody else, with their knowledge and assistance; and *The Queen v. Harrison*, 1 Leach's C. C. R. 47, was relied on (a). The jury found that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them. As it appears doubtful upon the authorities whether adultery, committed or contemplated, is neces-

(a) See *Regina v. William Berry*, ante, p. 95.

sary to constitute a felonious taking in cases of this nature, I directed a verdict of guilty to be entered, that the opinion of the Court for the consideration of Crown Cases Reserved might be taken upon the question whether, upon these facts, the indictment was supported. The prisoners were sentenced to six calendar months imprisonment with hard labour, and remain in prison. I respectfully request the opinion of the Justices of either Bench and Barons of the Exchequer upon this case.

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Case.

John Deedes,

Recorder of the liberty of *Romney Marsh*.

This case was considered, on 30th *April*, 1859, by COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON B.

No counsel appeared.

COCKBURN C. J.—The conviction in this case cannot be sustained. No adultery is shewn to have taken place between either of the prisoners and the prosecutor's wife, nor is it found that any was intended. The goods were taken in the presence, with the privity and consent of the wife, when she was abandoning her husband's dwelling. It is not necessary to lay it down as law that, supposing a stranger stole the goods of a husband, and the wife was privy to it and consenting, such privity and consent on the part of the wife would, if there was *animus furandi* in the stranger, exonerate him from what would otherwise be larceny. In deciding that this conviction should be quashed, it is not necessary to adopt that doctrine; but, on the other hand, we take it to be clear that a wife cannot be guilty of larceny in simply taking the goods of her husband; and, if a stranger do no more than merely assist her in the taking, inasmuch as the wife, as principal, cannot be guilty of larceny, the stranger, as

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accessory, cannot be guilty. In this case it was not left to the jury to say whether the prisoners were acting as principals when the act was done, or whether the wife was the principal and the prisoner merely aiding and assisting her. That finding might have raised the question; but, in its absence, we must assume that state of the case which is most favourable to the prisoners, and the conviction must be quashed.

Conviction quashed.

1859.

REGINA v. HARRIET WEBSTER.

The prisoner was convicted of perjury. The indictment charged that a cause was pending in the County Court of *C.* in which *A.* was plaintiff and *B.* defendant; that, on the hearing of such cause, it "became a material question whether the said *A.* had, in the presence of the prisoner, signed at the foot of a

THE following case was reserved by COCKBURN C. J.

The prisoner was tried before me at the last Spring Assizes, 1859, for the county of *Suffolk*, on an indictment for perjury.

The indictment charged "that a certain cause, in which *John Hart Bridges* and *Henry Cuthbert* were the plaintiffs, and *Joshua Webster* was the defendant, was pending in the County Court, and came on to be heard and tried before *John Worlledge*, the Judge of that Court; that on the hearing and trial of such cause it became a material question whether the said *John Hart Bridges* had, in the presence of the said *Harriet Webster*, signed at the foot of a certain bill of account purporting to be a bill of account between a certain firm called *Bridges & Co.* and the said *Joshua Webster*

certain bill of account between *A.* and *B.* a receipt for payment of the amount of the said bill;" and that the prisoner did falsely and knowingly swear "that the said *A.* did on a certain day, in the presence of the prisoner, sign the said receipt (meaning a receipt at the foot of the said firstly hereinbefore mentioned bill of account, for the payment of the amount of the said bill)." It was proved that *A.* had signed several similar receipts to similar bills in the presence of the prisoner.

Held, that the indictment was sufficiently certain and the conviction right.

a receipt for payment of the amount of the said bill: That the said *Harriet Webster* falsely, corruptly, knowingly and maliciously swore, among other things, that the said *John Hart Bridges* did, on a certain day, in the presence of the said *Harriet Webster*, sign the said receipt (meaning a receipt at the foot of the said firstly hereinbefore mentioned bill of account for the payment of the amount of the said bill)," whereas &c.

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Case.

It was proved by the Judge of the County Court, that on the trial of the cause of *Bridges and another* against *Webster*, the prisoner, who was the wife of the defendant in that suit, produced, in answer to the claim of the plaintiffs for goods supplied in the way of their business as brewers, an invoice of goods, at the foot of which was a receipt, which purported to bear the signature of the plaintiff *Bridges*; and the prisoner then swore that, at a time and place specified by her, the said *Bridges* in her presence wrote and signed the receipt in question.

Mr. *Bridges*, being called on the trial of the indictment, distinctly negatived ever having written or signed the receipt, either in the presence of the prisoner or elsewhere, and swore that neither the receipt nor the signature were in his handwriting. Another witness also proved that the handwriting was not that of Mr. *Bridges*.

It was objected (a), on behalf of the prisoner, that there was not evidence to support an indictment for perjury, there being only the oath of the prosecutor *Bridges* against that of the prisoner.

Upon this, however, I was of opinion that the document, as to the signing of which the conflict of

(a) *Orridge*, who appeared for the prisoner, stated that this objection was not reserved by the learned Judge on the trial, and was not made to the count of the indictment now under consideration; was therefore not dealt with by the Court.

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Case.

evidence arose, having been itself produced, and evidence having been given that the handwriting was not that of the prosecutor, there was sufficient evidence to support the charge of perjury.

It was then objected that the indictment was defective, as not sufficiently specifying the account and receipt to which the evidence on which the perjury was assigned related, and that, as it had been admitted by the prosecutor on cross-examination (as was the case) that he had on other occasions signed receipts in the presence of the prisoner at the foot of invoices or accounts rendered by his firm to the husband, there was nothing in the indictment to shew that the prisoner's statement might not have referred to some such genuine receipt and signature.

I thought this objection more formidable, but left the case to the jury, reserving these two points above set forth for the consideration of this Court. The prisoner was convicted.

According to the opinion of the Court on the points of law the conviction is to stand or to be set aside.

Prisoner admitted to bail.

A. E. COCKBURN.

This case was argued, on the 7th *May*, 1859, before COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON, B.

Orridge, for the prisoner.—The indictment is too uncertain and indefinite to enable the prisoner to meet the charge. It appeared that many receipts had been signed by the prosecutor in the presence of the prisoner, and it ought to have been alleged that the receipt intended was the one used on the trial in the County Court.

CROMPTON J.—Your objection is, that the indictment is bad on the face of it ; what have we to do with the evidence?

BRAMWELL B.—The indictment cannot be good or bad according as there is a greater or less number of receipts in existence.

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COCKBURN C. J.—Laxity of pleading ought not to be encouraged. Nothing would have been more easy than to state that the receipt was produced and shewn to the prisoner at the trial in the County Court.

Orridge.—The case of *Rex v. Hepper (a)* is in point. There, in an indictment for perjury committed in the Insolvent Debtors Court, it was alleged that the defendant falsely swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at that time ; and Lord *Tenterden* C. J., after consulting some of the other Judges, held that the indictment was insufficient, on the ground that it was not sufficiently definite and did not convey to the mind of the defendant the charge to be proved against him.

No counsel appeared for the Crown.

COCKBURN C. J.—We are all of opinion that the indictment is sufficient, and that the conviction is good. For my own part I thought at first that there should have been more particularity in the statement of the document ; but upon consideration, and looking at the real nature of the charge,—that of having given false testimony upon the trial in the County Court,—I am of opinion that it was only necessary to refer to the receipt incidentally, and as introductory to making out the materiality of the evidence upon which the perjury was assigned. We therefore think that the document is sufficiently stated and set forth in the indictment.

Conviction affirmed.

1859.

REGINA v. GEORGE MORRISON.

A pawnbroker's duplicate is the subject of larceny. It is a "warrant for the delivery of goods" within the meaning of section 5 of 7 & 8 Geo. 4. c. 29.; and is well described in an indictment, either as "a warrant for the delivery of goods," "a pawnbroker's ticket," or as "a piece of paper."

THE following case was reserved by MARTIN B.

The prisoner was tried before me at the last *Kent* Spring Assizes, 1859.

The indictment was for larceny and receiving.

The 1st count. Larceny of a warrant for delivery of goods, viz. for the delivery of a watch.

2nd count. Of a pawnbroker's ticket.

3rd count. Of a piece of paper.

4th count. For receiving all, then knowing them to have been stolen.

A pawnbroker's ticket, of which the following is a copy, was stolen :

George Gegan,
41, *High Street, Brompton,*
25th *November, 1858.*

213.

Gold Watch,

£1:5:0

John Hallsall,

Brompton Barrac.

Money lent on plate, watches, furniture, &c.

The prisoner was convicted of receiving it knowing it to have been stolen.

I request the opinion of the Court, whether the conviction is lawful. See stat. 7 & 8 Geo. 4. c. 29. s. 5.

SAMUEL MARTIN,
April 20, 1859.

This case was argued, on 30th *April, 1859*, before

COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B.
and WATSON B.

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No counsel appeared for the prisoner.

F. M. White, for the Crown.—It will be sufficient to sustain this conviction if it can be made out that a pawnbroker's ticket may be well described, in an indictment for larceny, either as a "warrant for the delivery of goods" within the meaning of the statute 7 & 8 *Geo.* 4. c. 29. s. 5., a "pawnbroker's ticket," or as "a piece of paper."

It is a "warrant for the delivery of goods." A warrant may be defined as an authority or as evidence of an authority to do an act, implying also the idea of a justification to the person acting under it. It is not necessary, in considering the character of an instrument or document such as this, to ascertain whether or not the person purporting to authorize actually has given the authority; it is enough if, looking to the well known character and effect of the document, it actually purports to give, and does on its face give or imply, the authority to do the act. A pawnbroker's ticket has this character impressed upon it by the Pawnbrokers Act, 39 & 40 *Geo.* 3. c. 99. The 6th section of that Act obliges the pawnbroker to give to the pawnor a note or ticket, in the form set out in the case, "which note must be produced to the pawnbroker before he or she shall be obliged to redeliver the chattel pawned." But not only is the pawnbroker not obliged to deliver the pledge unless the ticket is produced; but by the 15th section it is enacted, "to prevent any inconvenience to persons carrying on the trade and business of a pawnbroker from several different persons claiming a property in the same goods or chattels," that the person producing the ticket to the pawnbroker, as the owner of the goods or chattels mentioned therein, or as authorized by the

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owner thereof, to redeem and require a delivery of them, shall, as respects the pawnbroker, be deemed the real owner thereof; and the pawnbroker is directed and required, after receiving satisfaction respecting principal and profit, "to *deliver* such goods and chattels to the person or persons who shall so produce the said note or memorandum;" and the pawnbroker is declared to be indemnified for so doing.

The pawnbroker's ticket is therefore the authority or warrant to the pawnbroker to deliver the pledge to the person producing it; and also by the very words of the statute he is indemnified or justified in acting upon it. It is *prima facie* evidence to him that the person producing it, if not the owner or original pawnor, is to be considered as standing in his place as his agent, and as having authority to claim the delivery of the goods. The meaning of the word warrant is to be traced in the ordinary form of public warrants:—To do such and such an act "this shall be your sufficient warrant." It shall be your protection and indemnify you from the consequences. The word seems to be identical in its origin with "guarantee," which implies security to the person trusting in it and acting upon it. Again, dock warrants are documents very analogous to this in their form.

COCKBURN C. J.—But must there not be three parties to the transaction,—the person authorizing, the person who is authorized to claim the delivery, and the person who is to deliver in pursuance of the authority?

F. M. White.—I submit not, as respects the pawnee. He only looks to the authority. The Act of Parliament gives this character to the ticket, and it is unnecessary for him to inquire into what may be called the title of the person producing the ticket to claim the delivery of the goods. A delivery order

or dock warrant is still so called, and is so in fact, although the party who originally deposited the goods claims them himself without the intervention of a third person. So, in the case of a transaction with a pawnbroker, the original pawnor might claim the goods; but as soon as he parts with the ticket there are then the three parties to the transaction, and the ticket becomes an authority or warrant in the hands of the party producing it. Here the ticket was stolen, and the person who stole it was able to produce it as an authority to the pawnbroker who acted upon it. The thief at any rate cannot now say that the ticket was not an authority. It is therefore immaterial to consider whether or not the ticket is a warrant while it remains in the hands of the original pawnor. When it has once parted from him it becomes a warrant in the most limited and strictest sense of the term. And although, in *Regina v. Fitchie* (a), a pawnbroker's ticket was held to be an accountable receipt for goods, there is nothing in that decision inconsistent with the present contention. The pawnbroker's ticket may be both an accountable receipt for, and a warrant for the delivery of goods, according to the circumstances of the case, or the point of view from which it is considered.

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But a pawnbroker's ticket may be also well described in an indictment by its own name, by which it is well known, or as a piece of paper. It is a chattel of recognised character, of defined value. By this same Act of Parliament a value is placed upon it. When it is first given the pawnbroker may charge a price for the ticket according to a fixed scale, sect. 6; and if it should be lost the loser may, on proof of his loss, obtain another ticket on payment of certain sums also fixed by the statute, sect. 16. *Regina v. Bing-*

(a) Dears. & Bell's C. C. 175.

1859. *ley (a)* decided that a person might be indicted for robbing another of a memorandum of a debt due to him. A cancelled cheque may be the subject of larceny; *Regina v. Walter Watts (b)*. This ticket is not a chose in action, nor is it in any way connected with real property.

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Case.

CROMPTON J.—Has it not been held that a man may be indicted for stealing a railway ticket?

F. M. White.—Yes, in *Regina v. Bolton (c)*. That case shews that the observations of *Alderson B.*, in *Regina v. William Mote Watts (d)*, are too wide. A railway ticket is evidence of a right in the holder to travel by the railway according to the tenor of the ticket.

Cur. adv. vult.

The judgment of the Court was delivered, on 4th June, 1859, by

CROMPTON J.—We are of opinion that this conviction is right, and ought to be affirmed. The question is whether a pawnbroker's ticket, in the usual form, is the subject of larceny, and is properly described either as a warrant for the delivery of goods, a pawnbroker's ticket, or a piece of paper. We think that the instrument in question is a "warrant for the delivery of goods" within the meaning of the 7 & 8 *Geo. 4. c. 29. s. 5.*, and that the stealing of such a document is an offence subjecting the offender to the same punishment as if he had stolen chattels of the like value as the value of the goods mentioned in the document. Probably the word "order" in this section would require that the instrument should contain a direction from one person to another to deliver or transfer goods; but we think that the word "warrant," as applied to the delivery of goods in this section, has

(a) 5 Car. & P. 602.

(b) 2 Den. C. C. 14.

(c) 1 Den. C. C. 508.

(d) Dears. C. C. R. 326.

a wider signification, and comprehends any instrument which warrants or authorizes the party holding the goods to deliver them, and requires him so to do. The Pawnbrokers Act, 39 & 40 *Geo. 3. c. 99.*, seems to give this effect to the instrument. By the 15th section of that statute, the person producing such ticket *as owner*, or *as for the owner*, is to be deemed, as far as the pawnbroker is concerned, to be the owner; and the pawnbroker is expressly directed and required to deliver the goods to the person so producing the ticket. It is said that this is for the protection of the pawnbroker according to the preamble of the section; but its being so is no reason against its being a warrant, the very essence of a warrant being an authority to deliver up, and a protection in so doing; and the express direction and requirement by this section to deliver to the party producing shews that, though the clause was intended to protect the pawnbroker, it at the same time gave the right to the bearer to require the delivery. It does not seem to us any answer to say that the delivery is only to be when there is no notice or knowledge of another title, or of a fraud or felony, as a similar state of things would arise with reference to a delivery order where it appeared to have been improperly obtained, or to represent goods obtained by theft or fraud; nor do we think it necessarily not a warrant by reason of its being an acknowledgment or token given only by the party holding the goods. Instruments are treated as warrants in the course of commercial transactions which are of this nature, and which are given to parties warehousing goods in such a manner as to be the warrant to the depositor or holder of the goods to deliver either to the party to whom the documents are delivered, or to the person obtaining them from him; and thus the document is a warrant not only to

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the party to whom the original depositor disposes of it, but also in the hands of the original depositor himself. Now the statute gives this very effect, as it appears to us, to the ticket which it requires the pawnbroker to give and the pawnor to receive; and, looking to the legal effect of the instrument and the operation given to it by the statute, and not to the mere form in which it is expressed, it seems to us that the pawnbroker's ticket may well be held to be a warrant for the delivery of goods within the meaning of the 7 & 8 Geo. 4. c. 29. But, supposing such a ticket not to be a warrant for the delivery of goods within the provisions of that statute, we are of opinion, on the other point in the case, that the conviction was right as for stealing a pawnbroker's ticket or piece of paper. It clearly is so unless it fall within the rule of the common law by which certain documents of title, and certain documents concerning mere *choses in action*, were not the subjects of larceny. We are not at liberty to infringe a rule so long settled, and which has been acted upon until the present time, but we should be very reluctant to extend such a rule, and we ought to be careful not to apply it to cases to which the authorities do not clearly shew it to be applicable. The state of the law in this respect was well remarked upon a hundred years ago by counsel—*Strange*, 1135 (a). He says, "If I steal a skin of parchment worth a shilling it is a felony, but when it has 10,000*l.* added to its value by what is written upon it, it is no offence to take it away;" and he proceeds to say, "The use to be made of this observation is, that so far as the law is settled it is not to be altered, but if it does not exempt this particular case there is no reason to exclude it;" and in this remark we fully concur. Documents of title to real property are not the subject of larceny, but we find no rule

(a) *Rex v. Westbeer.*

extending such doctrine to documents and tokens shewing a right to personal property; and the way in which the rule is enunciated as to real property seems to shew that it does not apply to documents relating to personalty. Again, if it is a document relating to, or concerning a mere *chose in action*, as a bond, bill or note, that is, as I understand it, a matter resting in contract, and giving a right by way of contract only, it is not the subject of larceny. In *The Queen v. Watts (a)* Alderson B. asks, Is not the reason why a *chose in action* is not the subject of larceny this, "because it is evidence of a right, and that you cannot steal a man's right?" And *Maule J.*, page 335, observes: "When one speaks of a piece of paper as being an agreement, it means that the paper is evidence of a right, and, as a right cannot be the subject of larceny, neither is the paper, which is evidence of it." Where, however, the thing represented by the paper is not a mere right of contract or chose in action, but is a personal chattel, to the property and right of possession of which the party has a right to treat himself as entitled, the rule does not seem to apply. The thing to which the document has reference is personal property, which may be stolen; and the words in which the rule is enunciated appear to us to treat such documents as not within the exception. The rule will be found laid down in the same, or nearly the same, words from the earliest time; see *Roscoe's Criminal Law*, by *Power*, 612, and the authorities there cited. This rule is stated to be, "that bonds, bills and notes, which concern mere choses in action, were held at common law not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property in possession of the party from whom they are taken." This clearly excludes from the rule documents of title

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(a) Dears. C. C. R. 326.

1859. importing property in possession of the party, and, remembering the former part of the rule, as to documents of title, so carefully confined to realty, we think that such documents of title to personalty cannot be considered within the rule. If it is a mere agreement to deliver property, not the party's own, or not specific, it would, we think, be within the rule. It would rest in agreement, would confer a right of action only, and would be in every respect a *chose in action*. But we look at the pawnbroker's ticket as importing a property in possession. We had some doubt at first whether the party could be said to have the right to the property in possession according to the meaning of the rule; but it is quite clear that the possession of the bailee, or pawnee, is the possession of the bailor or pawnor for the purpose of an indictment, and he has a right to lay the goods pawned or bailed as his goods, that is, as goods his property and in his possession: "goods *pawned*, and the like, may be laid to be the goods and chattels of the person to whom they are so entrusted, *or of the owner*, at the option of the prosecutors; see *Jervis's Archbold*, by *Welsby*, 14th edition, 34, where the authorities on this subject are collected. We think, therefore, that we should be extending the rule further than we are warranted by any authority in doing, if we were to hold that it extended further than to cases where the document concerns *choses in action* merely, and is only an agreement to deliver personal property, not the party's own; and we think that in the present case the document relates to personal property to which the party is entitled, and that he is not the less entitled to the possession because there is a lien, which there is in so many cases of bailment, where such lien does not interfere with the right of property or possession as far as concerns indictments. It should be observed that this con-

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struction by no means makes the provisions of the 7 & 8 *Geo.* 4. useless, as that statute has the effect of making the stealing, which might otherwise be the stealing of a chattel of extremely small value, a stealing of a chattel of the like value as the value of the goods mentioned in the document; and as there may be cases of orders for the delivery of goods which import no property in any specific goods, and where the rights of the holder may only depend on a contract to deliver some goods, so that the document is in effect the evidence of a mere *chose in action*, and would not be the subject of larceny if not within the provisions of the statute. We should add that it would be very difficult to hold the present ticket not to be the subject of larceny, without overruling the case of *Regina v. Boulton (a)*, a decision in this Court binding upon us. It was there held that a railway ticket in the usual form was a chattel, and the subject of an indictment for obtaining goods under false pretences. That, like the ticket in the present case, was in the nature of a token, and it evidenced the right of being carried on the railway without further charge, and it was more in the nature of a mere agreement and of a document concerning a mere *chose in action* than the present, where it imported a right to personal property. The Court held it, however, to be a chattel, valuable as conferring the privilege of travelling without further payment. If the ticket in the present case be the subject of larceny, and not within the exception referred to, the description of a "pawnbroker's ticket," or of a "piece of paper," is clearly sufficient. For these reasons we think that the conviction is right, and that it ought to be affirmed.

Conviction affirmed.

(a) 1 Den. C. C. R. 508.

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REGINA v. GEORGE SIMMONS.

A summons was issued by a justice of the peace, under 7 & 8 Vict. c. 101. and 8 & 9 Vict. c. 10., on the application of the mother of a bastard child against the putative father, more than twelve months after the birth of such child.

The summons was in the form pointed out in the schedule to 8 & 9 Vict. c. 10., alleging that the mother had given proof of payment of money for maintenance of the child within twelve months after its birth; but no such proof had in fact been given to the summoning justice.

THE following case was reserved by BYLES J.

The prisoner was indicted for perjury committed before the justices in Petty Sessions on the hearing of a summons to answer a complaint that he was the father of a bastard child. No proof had been given to the summoning justice that the defendant had paid any money for the maintenance of the child within the twelve months next after its birth. The justices in Petty Sessions made an order of affiliation against him.

All the assignments of perjury were abandoned by the prosecution, except on these three statements of the defendant on oath at the hearing before the justices in Petty Sessions.

First. "I never had any connexion with the complainant."

Second. "I have never given her a farthing."

Third. "I was not present at Mrs. Griffith's when Mrs. Lewis says I gave her money."

It was proved, both before the magistrates and at the trial, that the child, of which the defendant was the father, was born so long ago as *October, 1852*, and though the jury found the three assignments of perjury against the defendant, yet they found also that the defendant *had not, within twelve months next*

The defendant appeared at the Petty Sessions, according to the exigency of the summons, and made no objection to the proceedings; and the case on the hearing at such Petty Sessions was gone into upon the merits.

The defendant was convicted on an indictment charging him with perjury committed at such Petty Sessions, the jury finding that he had not within twelve months after the birth of the child paid any money for its maintenance.

Held, that the justices in Petty Sessions had jurisdiction, and that the conviction was right.

after the birth of the child, paid any money for its maintenance.

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It was objected by the prisoner's counsel that under these circumstances there was no jurisdiction in the magistrates in Petty Sessions to hear the complaint, and therefore that the defendant could not, in point of law, be guilty of perjury in swearing as above; see 7 & 8 *Vict. c. 101. s. 2.* and 8 & 9 *Vict. c. 10.* Schedules thereto.

I directed the jury on these findings to return a general verdict of Guilty, but saved the point. The defendant is out on bail (a).

J. B. BYLES.

This case was argued, on 30th *April*, 1859, before COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON B.

T. Edwards appeared for the Crown, and *H. T. Cole* for the prisoner.

H. T. Cole, for the prisoner (b).—The statutes on which this question depends are the 7 & 8 *Vict. c. 101.* and 8 & 9 *Vict. c. 10.* The first of those statutes, by section 2, enacts that the mother of a bastard child may, in a case like this, *upon proof* that the man alleged to be the father of such child has, within the twelve months next after the birth of such child, paid money for its maintenance, make application to a justice of the peace for a summons to be served upon the man alleged by her to be father of such child, and

(a) It was admitted on the argument that no objection was taken by the defendant on the hearing of the summons at the Petty Sessions, and that the summons was in the form pointed out in 8 & 9 *Vict. c. 10.*, and alleged that the woman applying had given proof before

the summoning justice of the payment of money for the maintenance of the child within twelve months after its birth.

(b) The clauses in these statutes are fully set out in *Regina v. Berry*, *antè*, p. 46.

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In this case no such proof as that required by the statute was given to the summoning justice. The proof was essential to the granting of the summons, and the justice had no authority to issue the summons at all.

ERLE J.—The woman had taken out a summons formal upon the face of it, and the justices in Petty Sessions could not refuse to entertain it.

Cole.—But this is a special jurisdiction given by the statute. The proof of payment of money is a condition precedent to the issuing of the summons; consequently the entire proceedings were a nullity. The test of jurisdiction is whether justices have power to enter upon an inquiry; *Regina v. Bolton (a)*, *Regina v. Scotton (b)*, *Regina v. Evans (c)*.

COCKBURN C. J.—The case of *Regina v. Evans* only goes to shew that there must be some process to bring a man before the Court.

Cole.—On the part of the Crown *Regina v. Berry (d)* will be relied on; but this case is distinguishable, inasmuch as the case expressly finds that there was not in fact any money paid by the defendant within the twelve months.

It will be said that the defendant waived the objection by not making it at the Petty Sessions; but it was a matter of public interest and could not be waived, and he could not waive that of which he was not aware. The proceedings being a nullity, no waiver could make them good; *Hanson v. Shackleton (e)*, *Taylor v. Phillips (f)*, *Graham v. Ingleby (g)*, *Goodwin v. Parry (h)*.

(a) 1 Q. B. Rep. 66.

(b) 5 Q. B. Rep. 493.

(c) 4 New Sess. 191.

(d) *Antè*, p. 46.

(e) 4 Dowling's Rep. 48.

(f) 3 East, 155.

(g) 1 Exch. 651.

(h) 4 T. R. 577.

F. Edwards, for the Crown, was not called upon by the Court. 1859.

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COCKBURN C. J.— We think that this case is governed by the principle of *Regina v. Berry*, which shews that the position advanced by the prisoner's counsel is untenable. It is contended by him that under the provisions of the statutes in question, in order to give jurisdiction to the justices in Petty Sessions, proof must have been given to the justice from whom the summons was obtained that money had been paid by the defendant within the time specified by the Act. *Regina v. Berry* decides that such proof is not of substance essential to the jurisdiction, but matter of process only, and as such can be waived by the defendant. Here the case is stronger than *Regina v. Berry*. The summons is in the form pointed out by the statute, and alleges that the woman had given the necessary proof; no defect is apparent on the face of the proceedings. No defence was in fact made on that ground, and it was the duty of the justices in Petty Sessions to proceed.

Conviction affirmed.

REGINA v. JOHN SIDEBOTHAM.

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THE following case was reserved by the Recorder of *Manchester*. The defendant was indicted for erecting a

house within 24 feet of another existing house, contrary to the provisions of the *Manchester Improvement Act*. By section 30 of that Act it is enacted, that it shall not be lawful to build any houses with their fronts facing each other, which shall be separated from each other by a space less than 24 feet wide, excepting only on sites of houses built prior to the Act, and except on vacant plots in streets partially built upon on both sides.

It appeared that *A.*, the owner of land, built up to the boundary of his land, the same not being in a street; and some time afterwards the defendant, the owner of the land in front of the houses built by *A.*, built a stable, within 24 feet, in front of *A.*'s houses.

Held, that the defendant was not prevented from doing so by the provisions of section 30, as that section applies only to the erection of new streets.

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At the *Manchester* General City Sessions holden before me on *Monday* the 22nd *November*, 1858, *John Sidebotham* was tried and found guilty of a misdemeanor on the following indictment; that is to say:—

City of *Manchester* in the county of *Lancaster* to wit. The jurors for our lady the Queen upon their oath present that before and at the time of the committing the offence hereinafter mentioned there was and still is within the said city of *Manchester* a certain house with the front facing into a certain street within the said city of *Manchester* called *Wright Street* and that *John Sidebotham* late of the city aforesaid in the county of *Lancaster* bricklayer then and there well knowing the premises on the sixth day of *September* in the year of our Lord one thousand eight hundred and fifty-eight at the city aforesaid in the county aforesaid and within the jurisdiction of this Court unlawfully did erect and build within the said city and jurisdiction a certain other house to wit a stable in such a position that the fronts of the said two houses face each other and are separated from each other by a space of less than twenty-four feet wide And the jurors aforesaid upon their oath aforesaid do say that the said house so unlawfully built and erected by the said *John Sidebotham* as aforesaid was not nor is erected upon the sites or site of any houses or house built prior to the passing of a certain Act of Parliament passed in the ninth year of the reign of her Majesty Queen *Victoria* entitled “An Act to effect improvements in the borough of *Manchester* for the purpose of promoting the health of the inhabitants thereof” and that the said house so built by the said *John Sidebotham* as aforesaid was not nor is built up to or according to or in continuation of or within the line of any house or houses already existing in the said street and that the same was and is built with its front much nearer to the front of the said first men-

tioned house than the line of the houses already existing on the opposite side of the said street from the said first mentioned house against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that before and at the time of the committing the offence hereinafter mentioned there was and still is within the said city of *Manchester* a certain house with the front facing into a certain street within the said city called *Wright Street* and that the said *John Sidebotham* late of the city aforesaid in the county of *Lancaster* then and there well knowing the premises on the sixth day of *September* in the year of our Lord one thousand eight hundred and fifty eight at the city aforesaid in the county aforesaid and within the jurisdiction of this Court unlawfully did erect and build within the said city and jurisdiction a certain other house to wit a certain enclosure to wit a wall in such a position that the fronts of the said two houses face each other and are separated from each other by a space of less than twenty-four feet wide And the jurors aforesaid upon their oath aforesaid do say that the said house so unlawfully built and erected by the said *John Sidebotham* as aforesaid was not nor is erected upon the sites or site of any houses or house built prior to the passing of a certain Act of Parliament made and passed in the session of Parliament held in the eighth and ninth years of the reign of her Majesty Queen *Victoria* entitled "An Act to effect improvements in the borough of *Manchester* for the purpose of promoting the health of the inhabitants thereof" and that the said house so built by the said *John Sidebotham* as aforesaid was not nor is built up to or according to or in continuation of or within the line of any house or houses already

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existing in the said street and that the same was and is built with its front much nearer to the front of the said first mentioned house than the line of the houses already existing on the opposite side of the said street from the said first mentioned house against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

In the year 1842 or 1843 a row of cottage houses was built in the township of *Ardrwich*, in the city of *Manchester*: there was no evidence to shew that the cottages had not been built up to the extreme limit of the land belonging to the owner of such cottages, except that he had made a flagged pavement in front of them of the width of 2 feet 6 inches; and the counsel for the prosecution stated that for the purposes of the trial it might be assumed that they had been built up to such extreme limit. The cottages fronted due South, as near as possible running East and West. At the time these cottages were built there was no house or building opposite to them; the whole of the land in front was vacant, that is, unbuilt upon. Seven or eight years ago the present owner, Mr. *Welsh*, purchased these cottages; they were then not all finished, but they are now, and at this time are all tenanted; and at the time Mr. *Welsh* purchased them there was no wall or building opposite to them or any of them. In front of the cottage at the West end of the row was written "*Wright Street*." But no steps whatever had been taken to make it a street repairable by the public. The cottage at the West end of the row abutted towards the West upon a paved street; but such paving does not extend beyond the front line of the cottages; and the narrow flagged pavement in front of the cottages going Eastward extended only round the corner of the cottage at the East end of

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the row, and to the back door of that cottage, and no further; and there was no thoroughfare at all, the land to the East of the last mentioned cottage belonging to the defendant. To the West, and in the direction of what is called *Wright Street*, there is a paved street which is only six yards and a half wide, and which has been paved by the town four or five years: the part so paved was an old street, and the town have not hitherto taken upon themselves to pave any thing beyond the old street. After these cottages had been erected, and after they had become the property of *Welsh* as aforesaid, that is to say about six years ago, the defendant purchased, and became and was, and now is, the owner of the land whereon, in the month of *September*, in the year 1858, he erected and built the stable complained of in the first count of this indictment, and also the wall complained of in the second count of the said indictment. There was a model but no plan produced at the trial; the above sketch (a) may make my statement more intelligible. The defendant's wall complained of at the South West end thereof commenced at *Vance's* coal yard, and extended North East till it joined the back wall of defendant's stable; the wall is 10 feet 9 inches high, and the stable 18 feet 9 inches high. Nearly twenty years ago there was a high paling, 7 or 8 feet high, which, commencing where the South West extremity of defendant's wall does, extended in the same direction and in the same line that the wall does for 15 feet to the North East, dividing Mr. *Vance's* land from the land now the defendant's. That paling did not exist when defendant purchased this land, and there was no fence at all upon it then. At the end nearest *Vance's* coal yard it was higher by about 4 feet than the land on *Vance's* side, and the defendant's

(a) See plan or sketch annexed.

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land gradually rose higher as it went towards where the stable is; the whole of the land of defendant was cut sheer down, and there was no other mark to shew its limit but the bank of earth. Some time ago the defendant lowered that portion of his ground adjoining to Mr. *Vance's* until it was of about the same level as *Vance's*, and, there being no apparent boundary line between, Mr. *Vance* again put up paling where the old paling had been to mark the boundary of his own property, and also to prevent the defendant going over his land; and the defendant afterwards, following the line of the paling *Vance* had so put up, built in *September* last the said wall so complained of on his own land. As soon as ever the said wall crosses the line which I have marked as 8 yards from the cottages, it gets within the prohibited distance from the front of such cottages, and as it goes on to the North East it gets gradually nearer to the cottages, until at the point where it joins the back wall of the stable it comes to within 2 feet 10 inches of the front of the Easternmost cottage, and a portion of the back wall of the stable being of the length of 4 feet 7 inches, at the furthest point where it joins the said wall is only 2 feet 10 inches from the same cottage, and at the extreme East end of the same cottage the back wall of the stable is only 1 foot 10 inches from the front of it. The door into the stable is from the defendant's own land, and there is no opening by window or otherwise in the back wall of the said stable.

I had great doubt whether either the wall or the stable, which the defendant had clearly built within the prohibited distance of 8 yards from the front of the said cottages, were such buildings as are contemplated by the 30th section of the said Act; but it being considered that it was very desirable to have a construction put upon this most important Act of

Parliament by the Court of Criminal Appeal, I directed the jury that both wall and stable were such buildings as were so prohibited; at the same time telling them that that question would be reviewed by the Court of Criminal Appeal. The jury found defendant guilty. The question for the opinion of the Court is, Whether that direction was right as to both or either of the buildings complained of. The learned counsel for the defendant also contended that, even admitting that the defendant had broken the Act of Parliament, it was not an indictable offence. I held that, if he had broken the law, he might be indicted for it; but I reserved that question also for the Court of Criminal Appeal.

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R. B. Armstrong,
 Recorder of *Manchester* (a).

(a) The following are the sections of the statute (8 & 9 *Vict. c. 141.*) material to the case :—

By section 18, the council of the borough is authorized, for the purposes of effecting sanatory improvements, "to enter upon and take, and for that purpose to agree with the owners of any house or of any piece of ground within the borough, for the absolute purchase, for a consideration in money, of any such house or ground," or part thereof, at a sum to be agreed upon between the council and the owners.

By section 29, it is enacted that "no street to be made or laid out within the borough after the commencement of this Act shall be of less width than twenty-four feet, such width being computed in addition to and beyond all areas, windows or other projections."

By section 30, it is enacted that "it shall not be lawful to build within the borough any houses with their fronts facing each other which

shall be separated from each other by a space of less than twenty-four feet wide, excepting only in cases where such houses shall be erected upon the sites of houses built prior to the passing of this Act, and excepting also in cases where vacant plots of land may exist in streets already partially built upon on both sides; in which latter case it shall be lawful to build up to the line of the houses already existing in any such streets."

Section 31 regulates the height of houses in certain streets.

By section 32, front entrances are not to be opened into certain streets.

By section 33, the owner is to give notice to the town clerk before laying out a street.

By section 34, the town council is to make regulations as to level of streets.

By section 35, the town council may alter level, if made contrary to regulations, at expense of owners.

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This case was argued, on 7th *May*, 1859, before COCKBURN C. J., ERLE J., CROMPTON J., BRAMWELL B. and WATSON B.

Monk Q. C. appeared for the Crown; Dr. *Wheeler* and *Hopwood* for the defendant.

Dr. *Wheeler*, for the defendant.—The question arises on the construction of section 30 of the *Manchester Improvement Act*, which enacts that it shall not be lawful to build any houses with their fronts facing each other which shall be separated from each other by a space of less than 24 feet wide. This is not the case of a street; but it is a case in which the owner of land, having built cottages up to the extreme limit of his own land, objects to the defendant, the owner of the land adjoining the front of the cottages so built, building any houses facing his without leaving the required space. This statute must be construed with reference to the rights of the owners of property as well as with reference to sanatory purposes. Section 30 obviously points at the erection of new streets, and ought not to be so construed as to enable one man so to build as to deprive his neighbour of part of his property. Here the *locus in quo* was not a street at all.

Monk Q. C., for the prosecution.—The Act was passed for sanatory purposes, and the stable in ques-

By section 36, the town council may alter level of existing or future streets, sewers, &c., at the cost of the mayor, aldermen and burgesses.

Section 37. If houses, &c., injured by altering level of street, town council to make compensation to owners and occupiers.

By section 89, after enacting that the following words and expressions should have the several meanings thereby assigned to them, unless there were something in the

subject or context repugnant to such construction; it is enacted, that "words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number;" and that "the word 'house,' or the word 'houses,' shall include any messuage or dwelling-house, tenement, warehouse, manufactory, building or other inclosure, and every part thereof."

tion is within the object of the Act. Free circulation of air should exist between all erections within the town; and, by the interpretation clause, it is abundantly clear that a stable is a house within the meaning of the Act. The Act must be construed favourably for the benefit of the public; and it is submitted that the front of a house is that side of a house which looks towards the street, in the same way that frontage ground is that side of a piece of land which faces the road or street.

Section 30 cannot apply merely to the cases of new streets, for there are exceptions in the section which clearly shew that it has reference to existing streets.

By the interpretation clause, the word "houses" in section 30 may mean "house," and so every person who erects a house within the prescribed distance is within the provisions of the section.

The Act is a remedial rather than a penal Act, and its provisions are for the highest public benefit. The result of a contrary construction to that now contended for on the part of the Crown would be that section 30 would become a dead letter, and houses would be built within 24 feet of each other, which is manifestly, in the estimation of the Legislature, subversive to health.

Wheeler was not called upon to reply.

COCKBURN C. J.—We are of opinion that this conviction cannot be sustained. The case turns upon the construction of section 30 of the Act in question, which provides that it shall not be lawful to build within the borough any houses with their fronts facing each other which shall be separated from each other by a space of less than 24 feet, excepting only where such houses shall be erected upon the sites of houses built prior to the passing of the Act; and excepting also in cases where vacant plots of land may exist in streets

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already partially built upon on both sides; in which latter case it shall be lawful to build up to the line of the houses already existing in any such streets.

Primâ facie, it would seem that it is only an offence within the language of the section where a person builds, or two persons conjointly build, houses at the same time with their fronts (concurrently built) facing each other. If the back of a house was then made to face the front of the opposite house, I do not say whether that might not fall within the section. But, *primâ facie*, the houses must be built practically at one and the same time to come within the meaning of the 30th section.

By the interpretation clause, words importing the singular number shall include the plural number, and *vice versâ*; and Mr. *Monk* contended that the defendant was brought within section 30, inasmuch as the word "houses" might be read "house," and the words "each other" might be read "another;" but we can only apply the interpretation clause where it is clear the substantial enactment was intended to apply to "house" in the singular number as well as to "houses" in the plural; and when the context is looked at I do not think that that was intended. Section 30 is only one of a group of sections for making and laying out and building streets, and it is plain that this is not a street in any acceptance of the term.

In order to put the required construction on the section, we must change the words from "houses facing other" to "house facing each other." By doing this we should do violence to the words of the section, and make it refer to the case not of a street alone but of isolated buildings generally, which is contrary not only to the language but the spirit of the statute.

The other learned Judges concurred.

Conviction quashed.

REGINA v. FRANCIS INGHAM.

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THE following case was reserved by CROMPTON J.

The prisoner was convicted before me at the *June Old Bailey Sessions*, 1859, for having made a false and fraudulent entry in a book of account, with intent to defraud his creditors, on an indictment framed upon the 252d section of The Bankrupt Act, 12 & 13 *Vict.* c. 106.

It appeared that the prisoner had kept a book in which he entered his receipts and payments, and at the time of his bankruptcy that book shewed receipts of money to the amount of 4150*l.* 19*s.* 7*d.*, and payments to the amount of 3801*l.* 10*s.*, leaving a deficiency of 349*l.* 9*s.* 7*d.* to be accounted for. Being uneasy as to accounting for this deficiency he made a false book in which he entered false amounts opposite many of the items of receipts and payments, so as to shew receipts by him to the amount of 2668*l.* 5*s.*, and payments to the amount of 3172*l.* 1*s.* 7*d.*

The jury found that this was done by him with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they found that it was not done to defraud the creditors of any money or property, or to conceal any money or pro-

A bankrupt was convicted on an indictment, framed upon section 252 of the 12 & 13 *Vict.* c. 106. (The Bankrupt Law Consolidation Act, 1849), for making a false and fraudulent entry in a book of account, with intent to defraud his creditors.

The jury found that the entry in question was made by the bankrupt with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to

account for the deficiency appearing in the genuine account; but they found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him.

Held, that the conviction was wrong as the bankrupt was not found to have had any intent to defraud his creditors within the meaning of the statute.

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perty, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him.

On this finding the jury, by my advice, returned a verdict of guilty, subject to a case to be reserved by me as to whether the false entries were, upon the state of facts found by the jury, made "with intent to defraud his creditors," within the meaning of those words in the above mentioned section.

It may be observed that the 252d section renders it necessary that, besides the act being done to defraud creditors, it should be done either "after an act of bankruptcy," or "in contemplation of bankruptcy," or "*with intent to defeat the object of the law relating to bankrupts,*" which expression may be argued to shew that something more than defeating the operation of the bankrupt laws is intended by the phrase "with intent to defraud his creditors."

See *Gordon's Case*, *Dearsley's Crown Cases Reserved*, page 586, top of page 588, bottom of page 600, and top of page 601.

The prisoner is at large on bail.

CHARLES CROMPTON.

Section 252 of 12 & 13 *Vict. c.* 106. (The Bankrupt Law Consolidation Act, 1849,) enacts: "That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate or falsify any of his books, papers, writings or securities, or make or be privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and, on conviction, be liable to imprisonment for any term

not exceeding three years, with or without hard labour.” 1859.

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This case was argued, on 12th *November*, 1859, before POLLOCK C. B., WILLES J., CHANNELL B., BYLES J. and HILL J.

Ballantine Serjt. and *Jacobs* appeared for the Crown, and *Lawrence* for the defendant.

Lawrence, for the defendant.—This conviction is under section 252 of The Bankrupt Law Consolidation Act, and I contend that the defendant had committed no offence within the meaning of that section, the essence of which is the making false entries with intent to defraud creditors. The offence which the defendant really committed would be included in the class of cases referred to in section 256, which enacts “that if, at the sitting appointed for the last examination of any bankrupt or at any adjournment thereof, it shall appear to the Court that the bankrupt has committed any of the offences hereinafter enumerated the Court shall refuse to grant the bankrupt any further protection from arrest; and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt it shall appear that he has committed any of such offences, the Court shall refuse to grant such certificate or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection.” One of the offences referred to, for which the bankrupt may have his protection refused and his certificate refused or suspended, is if the bankrupt shall, with intent to conceal the state of his affairs or to defeat the objects of the law of bankruptcy, “have kept, or caused to be kept, false books or have made false entries, or withheld entries in, or wilfully altered or falsified any book, paper, deed, writing or other docu-

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ment relating to his trade, dealings or estate." This is precisely what the bankrupt in this case has done. He has falsified his books, as the jury have found, to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and that is one of the offences a punishment for which is provided by section 256, but certainly is not a criminal offence contemplated by section 252, the jury having expressly found that there was no intent on the part of the bankrupt to defraud his creditors.

The defrauding contemplated by section 252 is not simply deceiving the creditors, but defrauding them of money or property; and here the intention of the bankrupt could not have been to defraud them of the money in question, which had long before been spent. The decision of Lord *Abinger* in *Regina v. Marner* (a) is very much in point. That was an indictment under the 99th section of 1 & 2 *Vict. c. 110.*, which enacts that in case any prisoner, with intent to defraud his creditors, wilfully and fraudulently omit in his schedule any property, or except out of his schedule as necessities any property of greater value than twenty pounds, he shall be adjudged guilty of a misdemeanor; and it was held by Lord *Abinger* that an insolvent, wilfully or fraudulently omitting sums of money from his special balance sheet, is not guilty of a misdemeanor under this section, as it only applies to cases where the omission would affect the interest of creditors, and not where it is an omission of money received and subsequently expended by the insolvent.

The learned counsel was here stopped by the Court, who called upon

Ballantine Serjt., for the Crown.—The jury find that the bankrupt's intent was to deceive his credi-

(a) *Car. & Marsh.* (28.

tors as to the state of his accounts. It is true that they also find that there was no intent to defraud them of any money or property; but section 252 does not mean to limit the offence to an intent by fraud to deprive the creditors of the property of the bankrupt.

POLLOCK C. B.—The finding of the jury is, in effect, that the man meant to do himself some good, but to do his creditors no harm.

HILL J.—Two intents are contemplated in the section: there must be the intent on the part of the bankrupt to defeat the object of the law relating to bankrupts; and, *plus* that, the intent to defraud his creditors—to deprive them of something to which they are entitled.

Ballantine.—In statutes in which the intent is so to limit the signification, the language is “with intent to defraud of money or goods;” but here the expression is used in its most general sense. To defraud means to deceive, to deprive a person of any right by deceit. The creditors of the bankrupt had a right to have a true statement of the bankrupt’s accounts; and the jury have found that these false entries were made with the view of depriving them of that right.

CHANNELL B.—The intent to deceive merely will not do.

POLLOCK C. B.—Is there any decision or dictum that “deceive” in law means to defraud? If a man wears an apron to conceal his worn out clothes he deceives, but he does not defraud. On some occasions both words mean to cheat, but to defraud means to cheat a person out of something.

BYLES J.—The 256th section expressly provides for the offence mentioned in the first part of the 252d section.

POLLOCK C. B.—You can hardly contend that if a

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man falsified his books, in order to conceal from his creditors certain matters on which he had spent his money, not with the object of defrauding the creditors, but simply because he did not like such matters to be known, he would be guilty of an offence within this section.

Ballantine.—It is true that when money is gone a knowledge of the mode in which it has been expended may not affect the position of the creditors; but it may have a great bearing upon the sort of certificate that the bankrupt would get. In *Regina v. Gordon (a)* the indictment alleged the intent to be to defraud the creditors by depriving them of their right to examine the bankrupt.

Lawrence was not called upon to reply.

POLLOCK C. B.—We are all of opinion that this conviction cannot be sustained. The jury have expressly found that this was done by the defendant with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent the creditors from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. Now it may be that in doing this the bankrupt intended to defeat the object of the bankrupt laws; but that alone is not sufficient to constitute an indictable offence under this section. It must also appear that the intent was to defraud the creditors, and the jury have expressly negatived any intention to defraud them; and upon the whole finding of the jury, therefore, it is impossible

(a) Dears. C. C. R. 586.

that this conviction can be sustained. If it could be supported, the consequences to which it would lead would be that the enactment in question would apply to a case where a man who had become bankrupt from a sudden pressure, but who was able when his resources were got in to pay, and who had paid, twenty shillings in the pound, might afterwards be indicted under this section on its being discovered that there was an item of expenditure in his accounts, entered under a false head to prevent its being known in what manner he had expended his money, a circumstance which, from motives that may readily be imagined, he wished to conceal without having the slightest wish or intention to defraud.

The other learned Judges concurred.

Conviction quashed.

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REGINA v. CHARLOTTE EVANS.

1859.

THE following case was reserved by the Vice Chairman of the *Glamorganshire* Sessions.

Charlotte Evans was indicted at the *Michaelmas* Quarter Sessions 1859, for the county of *Glamorgan*, for falsely pretending that a piece of paper was a bank note then current, good, and of the value of five

The prisoner was convicted upon an indictment for obtaining money by false pretences, the false pretence alleged

being, that a certain piece of paper was a bank note then current, good and of the value of 5*l.*; whereas it was not a bank note then current or good or of the value of 5*l.*, or of any value whatever.

It was proved that the note was the note of a private bank which was no longer in existence and which had paid a dividend of 2*s.* 4*d.* in the pound; and that a neighbouring banker refused to change it.

The Chairman told the jury that there was some evidence from which they might infer that the note was not of any value.

Held, that a person passing such a note as a good note, and as of the value of 5*l.*, knowing that the bank was insolvent and had stopped payment and could not pay the note in full, would be guilty of obtaining money by false pretences; but that as the Chairman had told the jury that there was evidence from which they might infer that the note was of *no value*, and as there was in fact no evidence from which it could be so inferred, the conviction must be quashed.

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Case. pounds, by which false pretence she did unlawfully obtain from one *Mary Miles* certain money with intent to defraud, whereas in fact the said piece of paper was not a bank note then current or good, or of the value of five pounds, or of any value whatever, as the said *Charlotte Evans* at that time well knew.

It appeared in evidence that the prisoner, on the 20th of *July*, 1859, tendered to one *Sarah Thomas* a piece of paper purporting to be a five pound note of the *Newport Old Bank*, and obtained change to the full amount of five pounds. There was no question as to the identity of the note or of the prisoner. But to prove the allegation in the indictment that the said note was of no value, Mr. *John Parry Morgan* was called, who stated that he was now cashier of the *West of England Bank* at *Cardiff*; that he remembered the *Newport Old Bank*; that that bank does not now exist; that he saw the doors of it shut; that it was a private bank, and paid a dividend of two shillings and fourpence in the pound in the year 1852 or 1853; that he knows *Newport*, which was the place where the bank named in this note transacted its business, and that there is no such bank to which it could be presented.

It was also proved by *David Jones*, who was one of the several parties to whom this note was transferred for value after it was changed for the prisoner, that he went to a bank in *Merthyr Tydfil* and there tendered it, but did not get change for it.

It was objected, on behalf of the prisoner, that the above was not sufficient evidence to go to the jury in support of the allegation, that the note was not good, or of the value of five pounds, or of any value whatever.

I overruled the objection, and told the jury that I thought there was some evidence from which they

might infer, if they thought fit, that the note was not of any value, and read to them the evidence of the witnesses above referred to verbatim.

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The prisoner was convicted and sentenced to four months imprisonment with hard labour, subject to a case for the opinion of the Court above, as to whether there was sufficient evidence before the jury to sustain the allegations in the indictment as above stated.

John Coke Fowler,

Vice Chairman and Stipendiary Magistrate.

This case was argued, on 19th of *November* 1859, before POLLOCK C. B., WILLIAMS J., CROWDER J., CHANNELL B. and HILL J.

No counsel appeared for the Crown.

Hardinge Giffard, for the prisoner.—The conviction must be quashed. In *Regina v. Williams (a)* a similar question arose. There the prisoner was indicted for obtaining 5*l.* by false pretences, the false pretence alleged being that a certain promissory note of the *Newport Old Bank* was a good and valid note, he the said *John Williams* well knowing that the said bank had long before stopped payment. It appeared in evidence that the prosecutor, on 5th *July* 1857, went to a public house where the prisoner was drinking, when the prisoner said that he would pay for a gallon of beer if anyone would change a 5*l.* note for him. The prosecutor handed over 5*l.* in exchange for the note which the prisoner assured him was a good one. The note in that case was issued by Messrs. *Williams* of the *Old Bank, Newport*, and was dated *May* 1847. The bank stopped payment in *October* 1851, and Messrs. *Williams* were made bankrupts in the same year. In that case MARTIN B., after conferring with BRAMWELL B.,

(a) 7 Cox's C. C. 351.

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directed an acquittal; and mentioned a case which had been tried some time previously at *Shrewsbury*, in which a learned Judge had pursued the same course.

There is also the case of *Rex v. Spencer (a)*, in which the indictment was for false pretences in passing a note of a bank that had stopped payment as a good note. It was proved that the prisoner knew that the bank had stopped payment, but it appeared that two only of the partners of the bank had become bankrupt, and the third had not. In that case *Gaselee J.* said, "On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away."

Here it appears by the case that the bank had paid a dividend of *2s. 4d.* in the pound; but who can tell that *20s.* in the pound may not be paid? The allegation in the indictment, that the note was of no value, is not supported by the evidence.

POLLOCK C. B.—There is no doubt that the obtaining money by a false pretence, in relation to the note of a bank which has stopped payment, may be the subject of a criminal prosecution, as in cases where the party produces the note and says that it is of such a value; but if the note is simply produced and left to tell its own story, would that alone be evidence of a false pretence? There seems to be no evidence that the prisoner was guilty of any fraud at all. She might have received the note five minutes before she obtained the change; and there is nothing to shew that she knew that the bank had stopped payment.

WILLIAMS J.—The only question reserved for this Court seems to be whether the allegation in the indictment, that the note was of no value, was supported by the evidence. The jury were told that there was evi-

(a) 3 Car. & P. 420.

dence from which they might infer that the note was not of any value. There is no other question left for us to consider.

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Giffard.—There was no evidence of the prisoner having said a word about the note when she obtained the change, or even that she could read. The fact of something having been paid upon the note was certainly no evidence that it was of no value.

POLLOCK C. B.—Probably this case might have been left to the jury in such a way that the verdict of guilty might have warranted the sustaining of the conviction. Had the prisoner represented the note to be of 5*l.* value when she knew it was not of that value, and the jury had found the false pretence and that the note was of less value than 5*l.* to her knowledge, it would have been sufficient to justify a verdict of guilty. But, as the case is stated for our consideration, the only question for us is whether there was evidence that the note was of no value. There is no reasonable evidence that the note was not of any value; for, although 2*s.* 4*d.* in the pound had been paid upon it, it might still be of some value. Upon the case therefore as it is presented to us the conviction cannot be sustained.

WILLIAMS J.—It is clear that as this case is stated to us the prisoner has not been rightly convicted; but I wish to guard myself against being supposed to hold that a person might not be convicted on an indictment for obtaining money by false pretences by means of such a note as this, provided it were proved that the prisoner, knowing that the bank had stopped payment and could not pay its notes in full, represented the note to be of full value and the note of a solvent bank. The question was not properly left to the jury.

CROWDER J.—The case was not properly left to the jury; indeed the question left to them was an imma-

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terial one. If the note was fraudulently represented by the prisoner to be a good note of the value of 5*l.*, there was evidence that the note was not of that value; but the Judge put it to the jury to say merely whether the note was of no value, not whether the prisoner knew it to be not a good note. If a person presents a note for 5*l.* as a good note for that amount, knowing that the bank has stopped, it would amply support an indictment for obtaining money by false pretences; but, as the case is put to us, the conviction cannot stand, for there was no evidence from which the jury could infer that the note was of no value. I come to the conclusion that the conviction ought to be quashed entirely on the ground that the Chairman told the jury that there was evidence that the note was not of any value.

CHANNELL B.—Without saying what was the right question to be left to the jury, I agree that there was no evidence to enable the jury to say that the note was of no value.

HILL J. concurred.

Conviction quashed (a).

(a) See *Rex v. Flint*, Russ. & Ry. 660; *Regina v. Clark*, 2 Dick. Q. S., by Talfourd, 315; 2 Russ. on C. & M. 296; *Rex v. Freeth*, referred to in a note to *Rex v. Williams*, Russ. & Ry. C.C.R. 127.

REGINA v. ROBERT WESTLEY.

1859.

THE following case was reserved by the judge of the Sheriffs' Court of the city of *London*.

At a Session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court in *September*, 1859, *Robert Westley* was tried before me on an indictment, a copy of which is hereto annexed. The necessary evidence for supporting a conviction was given upon the trial, except so far as appears by this case, and as to the sufficiency of which the opinion of the Court for the Consideration of Crown Cases Reserved

The defendant, who had petitioned the Court for relief of insolvent debtors as a trader owing less than 300*l.*, was convicted on an indictment for perjury committed by him before that Court at

an adjourned hearing of the matters of his petition.

The preliminary averments in the indictment were, that the defendant was a trader owing less than 300*l.*, and having resided as by law required within the district; and in proof thereof the prosecutor produced the petition of the defendant, signed by him and filed in the Court for relief of insolvent debtors, wherein he alleged, as facts upon which with others he founded his application to that Court, the same matters as were set forth in such averments.

Held, that the preliminary averments were sufficiently proved.

The indictment also alleged that notice of the petition was inserted in the *Gazette*; that a day was appointed for the first examination; and that the sitting on that day was adjourned. No evidence was given in support of these allegations; and it was objected that as they were not proved it did not appear that the Court had any jurisdiction to hold the examination.

Held, that, as, upon the filing of the petition, the Court had jurisdiction to institute the examination; and as the sittings of a Court of record are presumed to be lawfully and rightfully holden these allegations might be rejected as immaterial.

The indictment also alleged that the prisoner after the passing and coming into operation of certain statutes, to wit on the 20th of *May*, 1859, presented his petition. The time when two of the statutes were passed was inaccurately described, and although the indictment purported to set out the titles of the statutes *in hæc verba*, it inaccurately described the title of one of them.

With regard to the time when the Acts were passed, the Judge at the trial amended the indictment by striking out the words stating such time.

Held: 1. That it was competent for the Judge to make such amendment as above stated.

2. That with regard to the misdescription of the title of the statute, which was not amended at the trial, as the reference was made to the statute only to indicate that the petition was presented after the passing of such statute; and as it was also alleged in the indictment that the petition was presented on the 20th *May*, 1859, being a day after such passing of which the Court was bound to take notice, the description of the title of the statute might be altogether rejected.

Semble, that when the title of a statute is not correctly set out in an indictment, but is so described as to enable the Court to know with certainty what statute is referred to, no objection to the indictment on account of the variance would now be sustained.

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is requested. In support of the preliminary averments contained in the indictment, to the effect that the defendant was a trader within the meaning of the statutes relating to bankrupts, but owing debts amounting in the whole to less than 300*l.*, and having resided for six calendar months next immediately preceding the filing of his petition within &c., the prosecutor produced no other evidence than the petition of the defendant filed in the Insolvent Court, a copy whereof is hereto annexed. There was no evidence of the Court for the relief of insolvent debtors having appointed the 22nd *June* for the first examination of the petitioner or of the adjournment of the same. Neither was evidence given of notice to creditors in *The London Gazette* of the filing of the petition. It was objected by the counsel for the prisoner that the evidence was insufficient to support the indictment. It was further objected that the prisoner could not be found guilty on the indictment by reason of the misrecital of the Acts of Parliament in the introductory part of the indictment. I was requested by the counsel for the prosecution to amend the indictment by striking out those parts which appear in red ink (*a*) in the copy hereto annexed. It was objected on the part of the defendant that I had no power to amend as prayed. I overruled the objection, and ordered the indictment to be amended as prayed. The defendant was found guilty, but I consented to reserve for the judgment of the Court for the Consideration of Crown Cases Reserved the following questions, viz.—

1st. Whether, under the circumstances herein appearing, the evidence was sufficient to support a conviction.

2ndly. Whether the Court had power to amend the

(*a*) In the copy hereafter set out those parts are in italics, within [].

indictment as stated, and whether, as amended, it is sufficient.

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The conviction of the defendant is to be subject to the determination of the Court for Crown Cases Reserved on these points.

Defendant is in custody for want of bail, and judgment stands respited.

R. Malcolm Kerr,

Judge of the Sheriffs' Court of the city of *London*.

The indictment was as follows. The words appearing in red ink in the original are here printed in italics, within [].

Central Criminal Court, to wit.] The jurors for our lady the Queen upon their oath present that heretofore and after the passing and coming into operation of a certain Act of Parliament made and passed in a certain Session of Parliament holden in the fifth and sixth years of the reign of her present Majesty intituled "An Act for the relief of insolvent debtors" and after the passing and coming into operation of a certain other Act of Parliament [*holden in the seventh and eighth years of the reign of her present Majesty*] intituled "An Act to amend the law of insolvency bankruptcy and execution" and after the passing and coming into operation of a certain other Act of Parliament [*made and passed in the tenth and eleventh years of the same reign*] intituled "An Act to abolish the Court of review in bankruptcy and to make alterations in the jurisdiction of the Court of Bankruptcy and Court for the relief of insolvent debtors" to wit on the twentieth day of *May* in the year of our Lord one thousand eight hundred and fifty nine *Robert Westley* hereinafter mentioned being a trader within the meaning of the statutes in force relating to bankrupts but owing debts amounting in the whole to less than

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300*l.* and having resided for six calendar months next immediately preceding the time of filing his petition hereinafter mentioned within the parish of *Saint Matthew Bethnal Green* in the county of *Middlesex* within the jurisdiction of the said Central Criminal Court the distance whereof is less than twenty miles from the Insolvent Court hereinafter mentioned according to the laws then in force relating to insolvent debtors did present his petition to the Court for the relief of insolvent debtors in *England* to wit at *Portugal Street Lincoln's Inn Fields* and within the jurisdiction of the said Central Criminal Court the same petition having annexed thereto a schedule purporting to be a full and true schedule of his debts with the names of his creditors and other the particulars required by law and the said *Robert Westley* did thereupon in and by his said petition shew amongst other things to the said Court that he was a trader within the meaning of the statutes then in force relating to bankrupts but owing debts amounting in the whole to less than 300*l.* that he the said *Robert Westley* had resided six calendar months within the district of the Insolvent Debtors Court in *Portugal Street* aforesaid and that he the said *Robert Westley* had become indebted to divers creditors whose names were inserted in the schedule to the said petition annexed and that he the said *Robert Westley* was unable to pay his debts in full and the said *Robert Westley* was desirous that his estate should be administered under the protection and direction of the said Insolvent Court Whereupon he by his said petition did pray such relief in the premises as by the statutes then and now in force for the relief of insolvent debtors might be adjudged by the said Insolvent Court as by the said petition signed by the said *Richard Westley* on the said twentieth day of *May* in the year aforesaid in the presence of his

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attorney in the matter of the said petition duly verified by the affidavit of the said *Robert Westley* in the form in the schedule annexed to the said secondly recited Act (A. No. 2) filed in the said Court for the relief of insolvent debtors reference being thereunto had will more fully and at large appear. And the jurors aforesaid upon their oath aforesaid do further present that forthwith and after the filing of the said petition the said Court for the relief of insolvent debtors caused notice of the filing of the said petition to be given to the creditors of the said *Robert Westley* named in the said schedule and resident within the United Kingdom and whose debts respectively amounted to the sum of 5*l.* to be inserted in the *London Gazette* and thereby appointed a public sitting of the said Court for the relief of insolvent debtors at *Portugal Street* aforesaid to wit on the twenty-second day of *June* in the year aforesaid for the first examination of the said petitioner and the said Court did duly to wit on the day and year last aforesaid proceed to the holding of the said sitting and then adjourned the same sitting to the fifteenth day of *July* in the year aforesaid to wit at *Portugal Street* aforesaid. Whereupon afterwards to wit on the said last mentioned day the said Court for the relief of insolvent debtors did proceed to ascertain the truth of the allegations in the said schedule and petition to the end that the said *Robert Westley* might have relief in the premises. And the jurors aforesaid upon their oath aforesaid do further present that to the end last aforesaid to wit on the day and year last aforesaid at the Insolvent Court aforesaid in *Portugal Street* aforesaid in the county aforesaid and within the jurisdiction of the Central Criminal Court the said *Robert Westley* did appear in his own proper person before the said Court for the relief of insolvent debtors then and there to be examined touching and concern-

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ing the truth of the allegations contained in the said petition and of the several matters contained in the said schedule and the said *Robert Westley* was then and there in due manner sworn before the said Court for the relief of insolvent debtors and did take his corporal oath upon the Holy Gospel of God to speak the truth and give true evidence on such examination and touching and concerning the allegations and matters and the truth thereof and of and concerning all other matters in any way relating thereto the said Court then and there having sufficient and lawful competent power and authority to administer the said oath to the said *Robert Westley* in that behalf. And the jurors aforesaid upon their oath aforesaid do further present that the said *Robert Westley* being so sworn as aforesaid was then and there in due manner examined by and before the said Court for the relief of insolvent debtors on his said oath touching and concerning the truth of the allegations contained in the said petition and the several matters aforesaid. And the jurors aforesaid upon their oath aforesaid do further present that at and upon the said examination it became and was a material question and subject of inquiry and it became and was a material question and subject of inquiry in the premises and in relation to the truths of the allegations contained in the said petition and of the several matters contained in the said schedule and it became and was material that the said Court should ascertain and be informed for the purpose of adjudicating in the matter of the said petition whether or not he the said *Robert Westley* had ever passed or was ever known by the name of *Charles Westley* and whether or not he the said *Robert Westley* had ever signed a certain memorandum of agreement then and there upon the adjudication of the said petition produced and shewn to him the said *Robert Westley* bearing date the thirtieth day of *August* in the year of our Lord one thousand eight

hundred and fifty two and purporting to be made between *John Kidgell* of the first part *Samuel Gostage* of the second part *William Kidgell* of the third part and *Charles Westley* of the other part and whether or not the said *Robert Westley* had negotiated for the purchase of certain premises of and belonging to *John Kidgell* situate at *Reading* in the county of *Berks* in the name of *Charles Westley* and whether or not a certain letter bearing date .

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April in the year of our Lord one thousand eight hundred and fifty three and produced and shewn to him upon the said examination was in his handwriting. And the jurors aforesaid upon their oath aforesaid do further present that the said *Robert Westley* being so sworn as aforesaid then and there upon his said examination at and before the said Court for the relief of insolvent debtors unlawfully wickedly wilfully maliciously falsely and corruptly did depose swear and say amongst other things in substance and to the effect following that is to say That he the said *Robert Westley* had never passed by the name of *Charles Westley* that he the said *Robert Westley* did not sign the said memorandum of agreement so produced and shewn to him as aforesaid and that he the said *Robert Westley* believed the signature *Charles Westley* signed thereto to be in his the said *Robert Westley*'s brother's handwriting and that he the said *Robert Westley* believed the signature to the said letter to be in his brother's handwriting Whereas he the said *Robert Westley* had passed by the name of *Charles Westley*. And whereas he the said *Robert Westley* did sign the said memorandum of agreement. And whereas he the said *Robert Westley* did not believe the signature *Charles Westley* signed thereto to be in his the said *Robert Westley*'s brother's handwriting. And whereas the said *Robert Westley* did not believe the signature to the said letter to be in his

1859. brother's handwriting. And so the jurors aforesaid
WESTLEY'S upon their oath aforesaid do say that the said *Robert*
Case. *Westley* in so making and taking the said oath on
the said eighteenth day of *July* in the year aforesaid at *Portugal Street* in the county aforesaid and within the jurisdiction of the said Central Criminal Court before the said Court for the relief of insolvent debtors unlawfully knowingly wilfully and corruptly did commit and was guilty of wilful falsehood in manner aforesaid, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

The petition referred to in the case was as follows :—
To the Court for Relief of Insolvent Debtors.

The humble petition of *Robert Westley* (here was inserted the description of the petitioner).

Sheweth: That your petitioner is a trader within the meaning of the statutes now in force relating to bankrupts, but owing debts amounting in the whole to less than three hundred pounds.

That your petitioner has resided six calendar months within the district of this Honourable Court: that is to say, for upwards of six calendar months last past at 72, *Great Cambridge Street, Hackney Road*, in the county of *Middlesex*.

That your petitioner has become indebted to divers creditors, whose names are inserted in the schedule (A.) to this his petition annexed, and that he is unable to pay his debts in full.

That your petitioner has examined the said schedule and that such schedule contains a full and true account of your petitioner's debts, and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally, as nearly as such dates can be stated, the nature of

the debts and claims, and securities (if any) given for the same, and that there is reasonable ground in his belief for disputing so much of the debts as are thereby mentioned as disputed, and also a true account of the nature and amount of his property, and an inventory of the same, and of the debts owing to him, with their dates, as nearly as such dates can be stated, and the names of his debtors, and the nature of the securities (if any) which he has for such debts; and that the said schedule doth also contain a balance sheet of so much of his receipts and expenditures as is required by this Honourable Court in that behalf, and doth fully and truly describe the wearing apparel, bedding and other such necessities of your petitioner and his family, and his working tools and implements.

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That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses, not exceeding 5*l.*, of this his petition, or in the ordinary course of trade) at any time within three months of the date of filing this his petition, or at any time with a view to this petition.

That your petitioner is desirous that his estate should be administered under the protection and direction of this Honourable Court, and that he verily believes that such estate is of the value of £ [nothing] at the least unincumbered, and beyond the value of his wearing apparel, and other matter which your petitioner is authorized to except by this Act, and that the same is available for the benefit of his creditors.

That your petitioner is ready and willing to be examined from time to time touching his estate and effects and to make a full and true disclosure and discovery of the same. Your petitioner therefore prays such relief in the premises as by the statutes

1859. now in force for the relief of insolvent debtors may
 WESTLEY'S be adjudged by this Honourable Court.
 Case. And your petitioner shall ever pray, &c., &c.

Signed by the said petitioner on }
 the twentieth day of *May*, 1859, } (L. S.)
 in the presence of *Thomas Angel*, }
 of 41, *Watling Street, London*, at- } *Robert Westley.*
 torney or agent in the matter of }
 the said petition. }
Thomas Angel.

This case was argued, on 19th *November*, 1859, before POLLOCK C. B., WILLIAMS J., CROWDER J. CHANNELL B. and HILL J.

Pearce appeared for the Crown, and *Metcalfe* for the prisoner.

Metcalfe, for the prisoner.—First, the indictment was not sustained by the evidence. The Court for relief of insolvent debtors is a Court created by the Legislature, and unless the requirements of the statutes under which that Court is constituted were complied with, it had no jurisdiction; and false swearing before it would not be perjury. The Court sits under the authority of 5 & 6 *Vict. c. 116. s. 1.*, 7 & 8 *Vict. c. 96. ss. 1, 2, 3,* and 10 & 11 *Vict. c. 102. s. 6.* The preliminary matters necessary to give jurisdiction to the Court are alleged in the indictment, namely that the prisoner was a trader within the meaning of the statutes in force relating to bankrupts, but owing debts amounting in the whole to less than 300*l.*, and had resided in the district as therein mentioned. There was no proof of these preliminary matters on the trial. The petition of the prisoner alleging these circumstances is not sufficient evidence of them. The indictment then goes on to allege that the Court caused notice of the filing of the petition to be given

to creditors in *The London Gazette*, and thereby appointed a public sitting on the 22d June. None of these matters were proved.

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The 3rd section of 7 & 8 Vict. c. 96. enacts that the Commissioner authorized to act in the matter of the petition shall cause notice of the filing thereof to be given, and appoint a public sitting for the examination of the petitioner. The allegation of the appointment of the sitting was therefore material, and there was no proof whatever of it. Assuming then that the prisoner swore falsely, he did so in a proceeding *coram non judice*, and is not indictable for perjury.

POLLOCK C. B.—Suppose that this matter had taken place at the Central Criminal Court, which now sits by Act of Parliament upon certain days appointed by the Judges, would you say that it would be necessary to prove that the Judges had met together and appointed certain days, and that on those days the Court was regularly adjourned? That Court is quite as much the creature of a statute as this. Or suppose a person indicted for perjury, committed before the House of Lords, would it be necessary to prove Her Majesty's proclamation for the assembling of Parliament?

Metcalfe.—Probably not. As to the Central Criminal Court, the appointment of days is a general rule for all cases; but a special appointment must be made in the case of each insolvent. An indictment for a conspiracy to defraud creditors of a bankrupt, against whom a commission had issued *de facto*, was in *Rex v. Jones* (a) held bad for not alleging that the party had actually become bankrupt.

POLLOCK C. B.—Under the old law the jurisdiction

(a) 4 B. & Ad. 345.

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of the Commissioners was founded entirely upon the fact of the party having become bankrupt.

Metcalfe.—The words of section 40 of 7 & 8 *Vict. c. 96*. are, that if any person who shall take an oath “under or in pursuance of” the Act, shall be guilty of wilful falsehood, he shall be subject to the same pains as a person convicted of perjury.

HILL J.—Authority is expressly given to the Commissioner to inquire into the matter of the petition.

Metcalfe.—Yes; but the prisoner is indicted for perjury in respect of evidence given at an adjournment, and it was essential to allege and prove that such adjournment was pursuant to the Act. Upon an indictment against a bankrupt, under sect. 253 of the 12 & 13 *Vict. c. 106*., for obtaining goods on credit, it was held essential to prove, not only the petition to and adjudication by the Court of Bankruptcy, but also the preliminary matters, namely the petitioning creditor's debt, the trading, and the act of bankruptcy; *Regina v. Lands (a)*.

WILLIAMS J.—There the offence could not be committed unless the person charged was bankrupt. In this case why would it not have been sufficient to allege simply that the perjury was committed before the Court for relief of insolvent debtors? This Court would presume that that Court was sitting under proper authority.

POLLOCK C. B.—This is an indictment for false swearing in the Court for relief of insolvent debtors, upon a matter material to the inquiry. It would have been sufficient to allege that the Court had authority to administer the oath, and these allegations might be struck out altogether. The Court for relief of insolvent debtors is a Court of record, and when it sits we must presume that it sits under due authority.

Metcalf.—It was not competent for the Judge to make the amendments objected to.

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POLLOCK C. B.—We think it clear that the Judge could amend.

Metcalf.—Supposing that to be so, the title of 10 & 11 *Vict. c. 102.* is still incorrectly stated. Instead of “Court of Bankruptcy and Court for the relief,” as stated in the indictment, the words of the title of the Act are “Courts of Bankruptcy and Court for relief.” This variance is fatal. Variances as small have been so held; *Boyce v. Whitaker* (a), *Beck v. Beverly* (b), *Rex v. Marsack* (c).

Pearce, for the Crown, was not called upon.

Cur. adv. vult.

The judgment of the Court was delivered, on 26th November 1859, by

POLLOCK C. B.—The first question raised in this case, and argued by the counsel for the prisoner, was, whether the allegations in the indictment “that the prisoner was a trader owing debts less than 300*l.*, and that he resided,” &c., were sufficiently proved by the production of the petition, signed by the prisoner, and presented by him to the Insolvent Court. That petition alleges the very same matters as facts, upon the truth of which, with others, the prisoner rested his application to the Insolvent Court. As against him, therefore, the statements in the petition, uncontradicted by any conflicting testimony, were abundant evidence to prove these allegations in the indictment.

The second objection argued by the prisoner’s counsel was, that no evidence was given at the trial to prove the allegations in the indictment “that notice of the

(a) 1 Dougl. 94.

(b) 11 Mee. & W. 845.

(c) 6 T. R. 771.

1859. petition was inserted in the *Gazette*, and that a day was appointed for the first examination of the prisoner, and that the sitting on that day was adjourned to the 15th day of *July*;" and it was contended on behalf of the prisoner that these allegations were material, and that, as they were not proved, the Court had no jurisdiction to hold the examination so as to make the prisoner criminally responsible for having wilfully sworn that which was false.

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It was proved that the petition of the prisoner was filed in the Insolvent Debtors Court, and by the combined effect of the statutes 7 & 8 *Vict. c. 96* and 10 & 11 *Vict. c. 102.*, that Court, upon the petition being filed, had jurisdiction to institute the examination upon which the prisoner swore falsely.

The Insolvent Debtors Court is a Court of record; we must take notice of that fact, and must presume that its sittings in a matter within its jurisdiction were lawfully and rightfully holden.

The indictment contains a general allegation "that the Court had sufficient and lawful competent power to administer the oath to the prisoner in his examination touching and concerning the truth of the matters contained in the petition and schedule;" that, in our opinion, is quite sufficient to support the indictment (14 & 15 *Vict. c. 100. s. 20.*), and the allegations, of which no proof was offered at the trial, may be rejected.

The last objection raised was that the Judge who presided at the trial had not power to make an amendment by striking out certain words, inaccurately describing the time when certain statutes passed; but that, even if he had such power, the amendment did not go far enough, as the title of the statute 10 & 11 *Vict. c. 102.* still remained incorrectly set out, inasmuch as the word "Courts" was written "Court," and the description,

“Court for relief of insolvent debtors,” was written
 “Court for the relief of insolvent debtors.”

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With respect to the first part of the last objection, it was not much insisted on, and during the argument we expressed our opinion that the Judge had power to amend; but with regard to the latter part of the objection, that the title of 10 & 11 *Vict. c. 102.* was inaccurately described, it was argued that as the indictment professed to set out the title of the statute *in hæc verba*, and failed to do so accurately, the variance was fatal; and many authorities were referred to in support of the objection. It is unnecessary for the Court to examine their applicability, or whether a variance in such minute particulars is material, because, on reading the indictment, it is manifest that the reference is made to the statute only to indicate that the petition of the prisoner to the Insolvent Debtors Court was presented after the passing of that Act. There is, however, in the indictment a sufficient allegation of time when the petition was presented, viz. 20th *May*, 1859, being a day after the passing of the Act, of which we are bound to take notice, so that the reference to the statute in the indictment may be altogether rejected. This objection, therefore, also fails, and the conviction must be affirmed.

His Lordship then added.—What I am about to state is no part of the judgment which I have given, but my own opinion, though I believe it to be the opinion of every member of the Court also. In a case where the title of an Act of Parliament is not accurately stated, but is stated with so much clearness and accuracy as to enable the Judges, who know the titles of all the Acts that have ever been passed, to know the Act referred to, and to leave no possible doubt on their minds upon the matter, I must say I, for one, notwithstanding the cases that were cited,

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sitting in this Court, am prepared to hold that a variation so small and insignificant furnishes no ground of objection. And I am not prepared to apply the doctrine that has been laid down in the cases that have been cited.

Conviction affirmed.

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REGINA v. THOMAS GOSS.

The prisoner was convicted on an indictment for obtaining money by false pretences.

It appeared that the prosecutor bought of the prisoner and paid him for eight cheeses upon a false representation by him that certain "tasters" which he produced had been extracted from and were part of the cheeses which he offered for sale, whereas they had not been so extracted but were in fact part of another and inferior cheese.

THE following case was reserved by the Recorder of *Northampton*.

The prisoner *Thomas Goss* was tried before me, at the last *Michaelmas* Sessions for the Borough of *Northampton*, for obtaining money by false pretences.

The first count of the indictment stated that the prisoner, having in his possession divers pounds weight of cheese of little value and inferior quality, and contriving and intending to cause it to be believed that the said cheese was of good flavour and excellent quality, and also having in his possession divers pieces of cheese called "tasters" of good flavour, taste, and quality, and contriving and intending to cheat one *Thomas Roddis* out of his money, then and there unlawfully, knowingly and designedly, did falsely pretend to *Roddis*, that the said pieces of cheese called "tasters," which he *Thomas Goss* then and there delivered to *Roddis*, were part of the said cheese the said *Thomas Goss* then offered for sale, and that the

held, that the false representation made by the prisoner was an indictable false pretence, and that the conviction was right.*

* See next case.

said cheese was of good and excellent quality, flavour and taste, that every pound weight was of the value of fourpence halfpenny; by means of which said false pretence, the said *Thomas Goss* did then and there unlawfully and fraudulently obtain of and from the said *Roddie* the sum of three pounds nineteen shillings and sixpence, with intent to cheat and defraud him of the same, whereas the said pieces of cheese which the said *Thomas Goss* delivered to *Roddie*, were not part of the said cheese which the said *Thomas Goss* offered for sale, and whereas the said cheese which the said *Thomas Goss* offered for sale was not of good and excellent quality, flavour and taste, and whereas every pound weight of the said cheese was not of the value of fourpence halfpenny, which the prisoner well knew.

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The second count of the indictment was in the same form as the first, excepting that it did not charge that the prisoner designated the samples as "tasters," and that it contained and negatived an additional false pretence, that the cheese offered for sale was of the same quality, flavour and taste as the samples.

The third count stated that the prisoner had in his possession divers pieces of cheese with intent to defraud, and delivered the same to *Roddie*, and unlawfully, &c., did falsely pretend to him that they were and had been taken from and were and had formed part and portion of certain cheeses which the prisoner then and there offered for sale, by means of which, &c., the prisoner did unlawfully, &c., obtain, &c., with intent to defraud, &c., whereas, &c., negativing the pretence.

The fourth count stated that the prisoner unlawfully, &c., did falsely pretend to *Thomas Roddie* that certain pieces of cheese, which he then and there de-

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livered and exhibited to *Roddis*, were and had been taken from, and were and had formed part and portion of, certain cheeses which the prisoner then and there offered for sale to him, by means of which, &c., the prisoner did then and there obtain, &c., with intent, &c., whereas, &c., negating the pretence.

It was proved at the trial that the prosecutor, *Thomas Roddis*, on the 19th *September* last, was attending the cheese fair, held within the borough of *Northampton*, and that the prisoner was in the fair, and sold to the prosecutor eight cheeses, weighing one hundredweight three quarters and one pound, for which the prosecutor paid the prisoner the sum of three pounds nineteen shillings and sixpence, being at the rate of fourpence halfpenny per pound. On the prosecutor going into the fair, the prisoner offered to sell him the eight cheeses, and bored six of them with a cheese scoop, and then produced and offered to the prosecutor several pieces of cheese which are called "tasters," successively at the end of the scoop for the prosecutor to taste, and in order that he might taste them as being respectively samples and portions of the six cheeses which the prisoner had bored; and accordingly the prosecutor did taste them, and then offered the prisoner fourpence halfpenny per pound for the eight cheeses which the prisoner accepted; the tasters, however, had not in fact been extracted from the cheeses offered for sale, for after the prisoner had bored the cheeses, and before he handed the tasters to the prosecutor, he took from his coat pocket pieces of cheese of better quality and description than those taken from the cheeses which he had bored, and privily and fraudulently put these pieces of cheeses at and into the top of the scoop for the prosecutor to taste, and the cheese which the prosecutor did taste was not any portion of the six cheeses which the pri-

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soner bored. The prosecutor at the time he bought the eight cheeses, believed that he had been tasting a portion of those cheeses, and in that belief he bought them, and paid the prisoner the three pounds nineteen shillings and sixpence for them which he would not have done, unless he had believed that the tasters had been extracted from the cheeses which he so bought. The cheeses were delivered to the prosecutor, and he retained possession of them up to the trial.

The value of the eight cheeses would be about three-pence per pound. The prisoner's counsel at the trial objected that there was no evidence to support the indictment, or of any facts which would constitute a false pretence within the statute.

I left the case to the jury, and the prisoner was convicted; but, having some doubt as to whether the case of *Regina v. Abbott (a)* had not been shaken by subsequent decisions (See *Regina v. Bryan (b)*), I reserved the case for the opinion of the Court of Appeal.

John H. Brewer.

This case was argued, on 21st *January* 1860, before ERLE C. J., WIGHTMAN J., WILLIAMS J., WATSON B. and HILL J.

No counsel appeared for the prosecution.

C. G. Merewether, for the prisoner.—This case is precisely the same as *Regina v. Abbott (a)*, which was decided upon the authority of *Rex v. Kenrick (c)*. It was reserved in consequence of the remarks of some learned Judges on the case of *Regina v. Abbott (a)*, and unless that case can be impeached this conviction must no doubt be upheld. That case has gone further than any which has been brought before this Court,

(a) 1 Den. C. C. R. 273.

(b) Dears. & Bell's C. C. R. 265.

(c) 5 Q. B. 49.

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and has consequently not been subject to actual review. Two things must concur to render a person liable to conviction under the statute—he must make a false pretence, and he must, *by* that false pretence, obtain the chattel. The difficulty which is felt in the case of contracts arises upon the second point; because in those cases, as *Parke B.* says in *Regina v. Burgon (a)*, “the prosecutor gets a *quid pro quo* in part for his money,” and it is impossible to say that the fact falsely pretended was the *sole* reason for parting with the money. It is indeed questionable whether it be *any* reason; the *contract* is entered into by reason of the false pretence, but the *money* is paid in pursuance of the contract, and in return for goods actually delivered. In the ordinary case to meet which the statute was passed, of a representation that goods are sent for by a particular individual, the prosecutor *delivers* the goods to the prisoner solely on account of the false pretence; but in a case like the present he pays the money because he has got possession of an article which he has contracted to purchase in consequence of a falsehood. The question turns upon the words of the statute; and it is submitted that a falsehood, uttered preliminary to a contract, is not, within its meaning, the pretence by which the money is obtained.

In *Regina v. Roebuck (b)*, Lord CAMPBELL C. J., after giving his reasons for thinking the conviction in that case right, says, “At the same time I think it right to say that although the defence seems to me untenable, that there can be no false pretence within the statute if it be made in the course of a contract, I should have been very loth to concur in the doctrine which was laid down *obiter* in *Rex v. Kenrick* and acted upon in *Regina v. Abbott*; and I should have

(a) Dears. & Bell's C. C. R. 22.

(b) Dears. & Bell's C. C. R. 24.

been inclined to adhere to the decision of *Littledale J.* in *Rex v. Codrington (a)*.

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In *Regina v. Eagleton (b)* the authority of *Regina v. Abbott* and *Rex v. Kenrick* was disputed in the course of the argument, and *Parke B.*, in a considered judgment in that case, said, "If this had been a case of a sale of bread to the prosecutors, with a false representation of the weight, and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed, and should have had to consider the case of *Rex v. Kenrick* and *Regina v. Abbott*."

In *Regina v. Bryan (c)* the false pretence charged was that certain spoons were of the best quality; that they were equal to *Elkington's A* (meaning spoons made by Messrs. *Elkington*, and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as *Elkington's A*. The jury found that these representations were wilfully false, and that by means of them, a loan was obtained, and it was held by ten learned Judges (*WILLES J. dissentiente*, and *BRAMWELL B. dubitante*,) that the conviction was wrong, the case being that of a mere misrepresentation at the time of sale of the quality of the goods.

WIGHTMAN J.—Here the false representation was that the sample was part of the same cheese.

Merewether—Yes; but that is preliminary to making the contract of purchase. The authority of *Regina v. Abbott* and *Rex v. Kenrick* was considered in *Regina v. Sherwood (d)*, but there the false representation was as to the quantity, not the quality of the articles sold.

ERLE C. J.—The five Judges, who to-day constitute

(a) 1 Car. & P. 661.

(c) Dears. & Bell's C. C. R. 265.

(b) Dears. C. C. R. 515.

(d) Dears. & Bell's C. C. R. 251.

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this Court, are prepared to come to the same decision as was arrived at in *Regina v. Abbott*; some of them would have come to that decision, if the matter were *res integra*, and the rest of the Court are prepared to act upon it; but, before giving judgment, we will hear the case of *Regina v. Joseph Ragg*, in which a similar question is involved.

(See judgment at the end of the next case, page 217).

Conviction affirmed.

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REGINA *v* JOSEPH RAGG.

The prisoner was convicted on an indictment for obtaining money by false pretences. It appeared that the prosecutor bought of the prisoner and paid him for a quantity of coal upon a false representation by him that there were 14 cwt., whereas in fact there were only 8 cwt.; but so packed in the cart in which they were as to have the appearance of a larger quantity.

THE following case was reserved by the Deputy Chairman of the General Quarter Sessions of the Peace for the county of *Leicester*.

Joseph Ragg was tried before me at the General Quarter Sessions of the peace for the county of *Leicester*, held on the 3d day of *January*, 1860, for obtaining money under false pretences from *Henry Harris*. The indictment stated the pretence to be a false pretence as to the character and weight of a quantity of coals sold and delivered by the prisoner to the prosecutor. It appeared in evidence as follows:—The prisoner was a coal-dealer. On the twenty-eighth day of November, he called at the house of the prosecutor in *Loughborough*, with a load of coal in a cart, and inquired if he (the prosecutor) wanted to buy a load of "*Forest*" coal. The prosecutor replied

Held, that the false representation as to the quantity of the coal was an indictable false pretence, and that the conviction was right.*

* See last case.

that the coals did not look like *Forest* coal, because they looked so dull. The prisoner replied, "I assure you they are *Forest* coal, and the reason of their looking so dull is because they have been standing in the rain all night; there is 15 cwt. of them, for I paid for 14 cwt. at the coal pits, and they gave me 1 cwt. in." On this, the prosecutor bought the coal and paid 7s. 6d. for the load. The prisoner unloaded the cart and packed the coals in the prosecutor's coal place; when the prosecutor saw the coals in the coal place, they appeared to be much too small a quantity to weigh 15 cwt. and he had them weighed, when it was found that they weighed 8 cwt. only.

The prisoner had at this time received his money, and gone away, but the prosecutor went after him, challenging him with the fraud, and asking for redress; the prisoner, however, refused to make any stating, "that he did not make childish bargains, and that the prosecutor could not do anything to him, because he had not sold the coal by *weight*, but by the *load*." The prosecutor stated that he had bought the coal on the representation of the prisoner that there were 15 cwt., and the size of the cart, and the appearance of the coal therein, warranted the belief that there were 15 cwt., but it turned out that the coal was loaded in a particular manner, technically known as "*Tunnelling*," that is, the coal (which is in large lumps) is so built up in the cart, that one lump rests on the edges of that below it, and large spaces are left between the lumps of coal, and thus there is an appearance of a greater quantity of coal than there actually is.

From further evidence it appeared that the coal was *not Forest coal at all*, and had not been bought at the pits, but was *Rutland coal*, and bought, that same morning, at a wharf in the town of *Loughborough*;

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that the cart, when loaded at the wharf, had weighed 8 cwt. only, and, although the prisoner stated that other coal had been added to it from another cart-load purchased at the same time from the wharf, there was no evidence of this produced at the trial.

It further appeared, that on the same day, and a very short time before the coal was sold to the prosecutor, the prisoner had offered the same load to another person as containing 13 cwt., but on looking at the cart it was evident that the coal was "*Tunnelled*," and the prisoner was then and there challenged with the fact, and told that there was not above 8 cwt. in the cart, or 10 cwt. at the most.

The prisoner was not defended by counsel, and the jury found him guilty.

With respect to the false pretence as to the "character" of the coal, it appeared to me, on inquiring of the witnesses, that there was not much real difference in value between the *Forest* coal and the *Rutland* coal; and that the preference of one over the other was rather according to the idea of the customer, than the actual value of the article; and I should not have considered it a case of false pretences under the statute, had this been the only misrepresentation; but I considered that the evidence shewed, not merely a false statement as to the quantity, but a pre-conceived intention to defraud, and a mode of packing the coal resorted to for the purpose of fraud, and that therefore the jury properly found the prisoner guilty. On referring, however, to the case of *The Queen v. Sherwood (a)*, I found that some of the learned Judges who gave judgment therein had apparently drawn a distinction between the case of a false representation made *during the bargaining*, and that made after the sale was completed; and in the present case, "*as the*

(a) Dears. & Bell's C. C. R. 251.

false pretence was made in the course of the progress of a sale," I did not feel justified in sentencing the prisoner, until the subject had come under the consideration of the Judges. I therefore postponed the sentence, and directed that the prisoner might be liberated on bail, to appear and receive sentence at the next *Easter Sessions*.

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Henry J. Hoskins,
Deputy Chairman.

This case was considered on 21st *January*, 1860, by ERLE C. J., WIGHTMAN J., WILLIAMS J., WATSON B. and HILL J., immediately after the argument in *Regina v. Goss* (*antè*, p. 208).

No counsel appeared, and the judgment of the Court in both cases was delivered by

ERLE C. J.—We are all of opinion that the conviction in each of these cases was right.

In the case of *Joseph Ragg* there was a false representation that there were 15 cwt. of coals in the cart when there were only about 8 cwt., so that, as to 7 cwt., there was a pretence of a delivery which was altogether false, and although the falsehood related only to a part of the entire quantity to be delivered, yet, as to that part such a case has been held to be within the class where payment for goods is obtained by a pretence of a delivery which is false as to the entire quantity that was to have been delivered. This is a false pretence of a matter of fact cognizable by the senses.

In the case of *Thomas Goss* there was also a false pretence of a matter of fact within the cognizance of the senses ; for, by a sample, which was represented to be part of the very cheese to be sold, but which was part of a cheese altogether different both in substance and value; he induced the purchaser to buy

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the inferior cheese. That was a false pretence as to the substance of the article for sale, by which the prisoner was enabled to pass off a counterfeit as and for the genuine substance.

In the case of *Regina v. Roebuck (a)* a false pretence, that a chain of base metal was a chain of silver, was held indictable. So here the drawing from the prisoner's pocket samples from another cheese, not the cheese intended for sale, and falsely pretending to the purchaser that those samples were part of the substance which he was to buy, is equally an indictable offence, and falls within the class of cases where there is a false pretence made in respect of the substance of the article offered for sale; where the purchaser intends to buy a particular substance, and the seller passes off to him a counterfeit. The same principle governs *Regina v. Abbott*, which is identical in its facts with the present case, and *Regina v. Dundas (b)*, where the article sold was falsely pretended to be *Everett's* blacking, a known article of value in the place of the sale, and was a totally different thing.

In the case of *Regina v. Bryan*, the case of the plated spoons represented as equal to *Elkington's A*, the Judges who constituted the majority decided that case on the principle that indefinite praise upon a matter of opinion is not within the limit of indictable offences.

Dissatisfaction has been expressed with that decision as if it must operate as an encouragement to falsehood and fraud, and so lead to mischief; but it should be recollected what an extremely calamitous thing it is for a respectable man to have to stand his trial at a criminal bar upon an indictment brought against him for cheating by a false pretence at the

(a) Dears. & Bell's C. C. R. 24.

(b) 6 Cox's C. C. 380.

instance of a dissatisfied purchaser. It is easy for an imaginative person to fall into an exaggeration of praise of the article which he is selling, and if such statements are indictable a purchaser, who wishes to get out of a bad bargain made by his own negligence, might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead of being obliged to bring an action where each party would be heard on equal terms. It is of great public importance to endeavour to define the line within which false representation becomes indictable.

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In *Regina v. Bryan*, my brother WILLES, who deserves well of all who take interest in the administration of the law, differed from the majority in the decision; he agreed in the principle that ought to govern, but differed in the application of that principle to the facts of that case. The Judges thought the representation "that the quality of the plating of the spoons, and the quantity of silvering laid on them by the electrotype process, was equal to *Elkington's A*, and that the material was the best," was exaggerated praise on a matter of opinion, and so not indictable; opinion not being directly cognizable by the senses. My brother WILLES thought it a representation on a matter of fact.

WIGHTMAN J.—I only wish to add with reference to the cheese cases and *Bryan's* case one observation. If the prisoner had said that the cheeses were equal to the tasters produced that would have fallen within *Bryan's* case; but he said to the prosecutor "These tasters are part of the very cheese I propose to sell to you;" and therefore it was a representation of a definite fact.

The other learned Judges concurred.

Conviction affirmed.

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REGINA v. WILLIAM LESLEY.

The defendant was convicted on an indictment charging him with assaulting the prosecutors on the high seas, and falsely imprisoning and detaining them.

The prosecutors were *Chilian* subjects and had been ordered by the government of *Chili* to be banished from that country to *England*.

The defendant, being master of an *English* merchant vessel lying in the territorial waters of *Chili* near *Valparaiso*, contracted with the *Chilian* government to take the prosecutors from *Valparaiso* to *Liverpool*; and they were accordingly brought on board the defendant's vessel by the officers of the government and were carried by the defendant to *Liverpool* under his contract.

Held, that, although the conviction could not be supported for the assault and imprisonment in the *Chilian* waters, it must be sustained for that which was done out of the *Chilian* territory; and that, although the defendant was justified in receiving the prosecutors on board his vessel in *Chili*, yet that justification ceased when he passed the line of *Chilian* jurisdiction, and the detention of the prisoners and conveying them to *Liverpool* was a wrong intentionally planned and executed in pursuance of the contract, amounting to a false imprisonment and triable by *English* law.

THE following case was reserved by WATSON B.

The prisoner was the master of the *British* ship *Louisa Braginton*, and the charge against him was for the false imprisonment of several *Chilian* subjects from *Valparaiso* to *Liverpool*.

These persons, having been ordered to be banished from *Chili* by the government of that country, were brought by force, guarded by soldiers of that state, on board the ship, whence the prisoner, under a contract (a copy accompanies this case) with the *Chilian* government, carried and conveyed these *Chilian* subjects to *Liverpool*.

The evidence, and an abstract of the indictment, accompanies this case. On this evidence I directed a verdict of guilty, reserving the question of law, whether or not the defendant was liable to an indictment in this country under the circumstances, for the opinion of this Court.

W. H. WATSON.

ABSTRACT OF INDICTMENT.

Indictment for assaulting *Benjamin Vicuna Mac Kenna*, *Angel Custodio Gallo*, *Manuel Antonio Matta* and *Guillermo Matta*, on the 10th March 1859, on the

high seas, and falsely, and without legal authority or justifiable cause, imprisoning and detaining them for ninety-eight days then next following.

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2d count. Common assault on them.

3d count. Like first, but confining it to *Benjamin Vicuna Mac Kenna*.

4th count. Common assault on him.

5th count. Like first, but confining it to *Angel Custodio Gallo*.

6th count. Common assault on him.

7th count. Like first, but confining it to *Manuel Antonio Matta*.

8th count. Common assault on him.

9th count. Like first, but confining it to *Guillermo Matta*.

10th count. Common assault on him.

11th count. Attempting to assault *Benjamin Vicuna Mac Kenna*, and thereby to occasion him grievous bodily harm.

12th count. Like, *Angel Custodio Gallo*.

13th count. Like, *Manuel Antonio Matta*.

14th count. Like, *Guillermo Matta*.

15th count. Conspiring with others unknown, violently and against the consent of the said *Benjamin Vicuna Mac Kenna*, *Angel Custodio Gallo*, *Manuel Antonio Matta* and *Guillermo Matta*, to carry and convey them on board a *British* ship called *The Louisa Braginton*, from the port of *Valparaiso*, across and upon the high seas to the realm of *England*, and to force and compel them to be and remain, without and against their consent, on board the said ship on the high seas and during the voyage, and unlawfully to imprison and detain them on board the said ship during the said voyage, and upon the high seas. That in pursuance of such conspiracy the said persons unknown brought the said *Benjamin Vicuna Mac Kenna*, *Angel*

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Custodio Gallo, Manuel Antonio Matta, and Guillermo Matta, and caused them to be violently, and against their wills and without their consent, brought to and on board of the said ship, which was then lying in the port of *Valparaiso* and on the high seas. That prisoner, in pursuance of the said conspiracy, then received and took them on board the said ship, he being then the master and commander thereof, it being then a *British* ship and within the jurisdiction of the Admiralty, and prisoner knowing that they were so brought on board against their wills and without their consent. That prisoner, in pursuance of the said conspiracy, caused the ship with them on board to leave the port of *Valparaiso* and proceed on her voyage to *England*, and to sail across the high seas, and to bring them, against their will and without their consent, across the high seas to a port in *England*, to wit the port of *Liverpool*.

16th count. Conspiring with others unknown, violently and against the consent of the said *Benjamin Vicuna Mac Kenna, Angel Custodio Gallo, Manuel Antonio Matta and Guillermo Matta*, to carry and convey them on board a *British* ship called *The Louisa Braginton*, from a port beyond the seas, to wit the port of *Valparaiso*, across and upon the high seas to the realm of *England*, and to force and compel them to be and remain, without and against their consent, on board the said ship on the high seas and during the said voyage, and unlawfully to imprison and detain them on board the ship during the voyage and upon the high seas.

EVIDENCE.

Benjamin Vicuna Mac Kenna.—I am a *Chilian*, and until recently I was the editor and proprietor of a newspaper published at *Santiago*, which is the capital and the seat of the government. In *December*, 1858, there was some political difference with the government.

There was a general meeting held at *Santiago* on the 8th of *December* 1858.

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We were surrounded by troops and taken to prison in *Santiago* with many others, and amongst them the three gentlemen present. Two of them are members of the House of Representatives.

There are about sixty members altogether.

We remained in prison about three months.

On the night of the 8th of *March* we were taken to *Valparaiso* as prisoners. The distance is ninety miles. We were thirty hours on the road. We arrived in *Valparaiso* on the night of the 9th *March* last, still as prisoners.

When we got there we were taken to the wharf. The troops came all the distance, and surrounded the carriage. The ship *Louisa Braginton* was about a mile from the wharf, and two officers and four soldiers, with loaded guns, took us on board. I saw two soldiers and the chief officer come on deck, and two remain below. I heard the chief officer speak to the captain in *Spanish*. He mentioned our names, and pointed us out. The crew consisted of about thirteen men. A brother of mine was allowed by the authorities to come and see me, and also some other friends.

We did not know where we were going to, but we had our suspicions.

My brother wanted me to go on board of a man of war (a foreign one), but I said I would not do so as there were armed boats around the ship, and I wished to abide the fate of my friends.

The ship was ready to go to sea. The captain afterwards told me the ship had been waiting three days, and that he had received fifty dollars a day for waiting. A war steamer towed the ship out ten miles and escorted her till daybreak. The ship sailed in three hours after I got on board. I was only allowed

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to speak to my friends in the presence of an officer. We afterwards spoke to the captain, and we told him how we stood. We told him he had no right to take us as prisoners to *England*; that the *English* flag protects every one.

We said it was unlawful and shameful, that he was paid four times more than for ordinary passengers, and that it shewed he was in a criminal affair. We also said, Now is the time to amend your wrong, take us to *Peru*, which is very near; we will pay you the amount the government pays you, and will give you our private provisions; the question of money is no question for us. The captain replied that he was under a contract with the *Chilian* government, and was under a penalty of 1500 dollars for putting us in at *Liverpool*, and that he must do it. We then resolved to submit to our fate, hoping that our wrongs would be satisfied in *England*.

This is all that occurred, as near as I can recollect.

I often told him of the roughness of his conduct, and that it was worse than the slave-trade. He said many times that it was capital business, and that if we would pay him well he would take the president of *Chili* to the *Cape Horn*.

When at the *Azores* I saw the carpenter making holes in the gig and small boats. We landed at *Liverpool* on the morning of the 15th of *June*; soon afterwards we went to Messrs. *North* and *Simpson*, and stated our case.

Cross-examined.

There was a boy named *Isaac Matta* on board, about eleven years of age; he was not a prisoner; he was the brother of one of the gentlemen who was a prisoner. The father paid the passage-money for the boy. Several of our friends (relations) came to see us. One of them in haste provided us that day

with the provisions for the voyage. When I got on board I did not say I was glad to get out of the hands of those insulting villains. I did not say I was extremely glad to get away, or any thing like it. I did not know the vessel was going to *England*. I heard a whisper to that effect from the passengers. I did not make any protest on the night we were received about the captain receiving us. If the captain had offered to give us back to the officers, I do not know whether I would prefer going back with them or to go round the *Horn*; I perhaps would prefer remaining in my own country. I did not ask to be landed at *Valparaiso*. I would have preferred going back to *Chili*, as I did not know where we would be taken to. I do not know whether I would like to have remained with those armed men or not. I first spoke to the captain about putting us on shore the next day, the 11th. We were sick on the first day. *Arica* is to the north of *Valparaiso* about 6°, or about 400 miles. We were about the longitude of *Juan Fernandes*. We saw it on the 12th. I did not ask to be put on shore there, as we had made up our minds to go to *Liverpool*. After that we made no application to be put ashore. I asked the captain to put us ashore at *Arica*; he said he would vitiate the policy of insurance and the terms of the charter-party. I told him that any question of money was of no importance to us. The captain tipped me on the shoulder one night, and asked me what we were going to do, and asked me whether we intended to leave the ship. He said I know you intend to leave the ship; if you kick, I'll kick. I do not know the precise meaning of those words.

William Hortop.—I was mate of the *Louisa Braginton*. I remember a conversation with the captain before she left *Valparaiso*. He said he had entered into

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arrangements to take home a certain quantity of political prisoners; that was about twenty days before they came. The ship was receiving cargo at that time; we were waiting for them. I do not know that the captain was detained on their account, but I believe there was a kind of demurrage if they did not come within a certain time; I made an entry in the log about it. I remember their coming on board. They were brought in armed boats, and received on board by a guard of soldiers, who came before them in one boat.

The captain was there.

The captain gave me a pistol before we left *Valparaiso*.

I was to use it whenever anything wrong occurred.

That was before the men came on board, but after the time the captain told me they were coming. He had not given me a pistol before on the voyage out. When we had been about a day out, the captain desired me to load the pistol; that was after coming out of the cabin, after seeing the men he had taken on board. At the *Azores*, the captain consulted me as to the making holes in the boats to prevent the men getting away. I consented to it; I knocked one hole in the long boat; I cannot say whether the crew were armed then.

• At that time I made entries in the log-book.

These entries were afterwards torn out of the log-book by the captain's orders.

He said the statements were not correct. To the best of my knowledge the statements were correct. I have now got those torn leaves, and now produce them (they are hereunto attached).

The captain made fresh entries on a slate, and told me to copy them into the log-book.

It is my duty, and I usually keep the log-book.

•

At that time the captain walked about armed.

I kept the leaves that I had torn out of the log-book for my own protection.

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The captain did not know that I had kept them.

I told him that I had not got them, and that they were destroyed.

The captain objected to my entries because I had written that he had held a "consultation" with me, which the captain said was incorrect. I was present when the men were brought on board.

I received them.

They made no protest to me.

Their friends were on board. After their friends went away they went below, and called for the captain to arrange matters as to where they were to sleep.

The guard remained on board some short time.

The guard was not there when the vessel started.

There were four men in a boat to see that no one came on board our ship.

When off the *Azores*, the captain accused me of knowing the intention of the men.

I do not know how the men were treated. I was not living with them, but I believe they were treated like gentlemen.

I believe they had everything they asked for.

Messrs. *Huth, Gruning & Co.* are the consignees of the vessel.

I knew they were prisoners when they came on board.

I do not know whether the four men in the boat had muskets or not.

[The counsel for the prosecution called for the contract entered into by the defendant with the *Chilian* government.

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The document (with translation) was produced by defendant's counsel.

The log-book was also produced by defendant's counsel] (a).

Joseph Dickson.—I am an officer in the *Liverpool* Police Force. On *Friday* last, the 17th of *June*, I served a summons upon the defendant for an unlawful assault and imprisonment upon one *Benjamin Vicuna Mac Kenna*. He made no remark when I gave it to him.

He did not read it whilst I was present.

TRANSLATION OF CONTRACT.

It is mutually agreed between His Excellency, the Governor of the province of *Valparaiso*, *Jovino Novoa*, and *William Lesley*, master of the *British* barque *Louisa Braginton*, the following:—

1st. The latter obliges himself to receive on board five cabin passengers, to maintain them and convey them to the port of *Liverpool*.

2d. The vessel to be ready to sail from this port the twenty-eighth instant, and the charterer to dispatch her before the fifth of *March* next; the party

(a) The following are the entries in the log-book referred to in the evidence of this witness:—

“REMARKS.—*Thursday*, May 19.

4 A.M. The master came on deck and held a consultation regarding the passengers which he has a reason to think that something seareous is doing between them, to which i am totaly ignorant of anything regarding them.

William Hortop.

Friday, May 20.

A.M. Master held a consulta-

tion with me and concluding with taking out a plank from each boat.

The master called me below and desired me to give him every assistance in keeping the command of the ship to which i readily consented, assuring him i would do every thing that laid in my power.

William Hortop.

Saturday, May 21.

The master keeping the deck fully armed day and night.”

delinquent will pay to the party observant fifty dollars demurrage for each day's delay after those stipulated.

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3d. The former obliges himself to pay to the latter three thousand dollars cash, for which sum Messieurs *F. Huth, Gruning & Co.*, give a receipt, obliging themselves to return the same amount in case they should not present, within eight months from this date, a certificate from the *Chilian* Consul at *Liverpool*, or other valid document, to prove the landing in *Liverpool*, or any other port in *Great Britain* of the aforesaid five passengers (the risks of the sea, death, or other fortuitous circumstances always excepted).

4th. A penalty of one thousand five hundred dollars is stipulated, payable by the party delinquent to the party observant for all that is agreed in this contract, having signed two of one tenor and date, one of which being accomplished, the other to stand void.

Valparaiso, February 21, 1859.

Witness

(Signed) *Jovino Novoa.*

(Signed) *George Lyon.*

William Lesley.

This case was argued, on 21st *January* 1860, before ERLE C. J., WIGHTMAN J., WILLIAMS J., WATSON B. and HILL J.

Aspinall appeared for the Crown, and *Overend* Q. C. for the defendant.

The Court called upon

Aspinall, for the Crown.—I believe that no authority can be found on this subject. I submit, that, although the *Chilian* government might lawfully transport *Chilian* subjects in a *Chilian* ship, an *English* subject commanding an *English* ship could not lawfully lend his ship, even in a foreign port, for the purpose of its being made a gaol while in that port. The *English* ship was for some purposes within both the

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jurisdiction of the country in which the port was situate and the jurisdiction of the Admiralty of *England*.

The Merchant Shipping Act (17 & 18 *Vict. c. 104.*), by section 267, provides that a master of an *English* vessel shall be liable to proceedings in *England* for any offences against property or persons committed in any part of the world, either ashore or afloat. The captain of a *British* ship is not compellable by any foreign government to make his vessel a prison; and, if he contracts to do so, he makes himself a party to the duress, in which the persons are brought on board. The defendant cannot justify his acts in this case by any warrant of the *Chilian* government.

ERLE C. J.—Assume that the Act was lawful as between the prosecutors and the *Chilian* government, and that the *Chilian* government employed the defendant as their servant to do an act which, as between them and the prosecutors, was a lawful act?

Aspinall.—I not only contend that the defendant has chosen to enter into a contract which was unlawful in its inception, but that, even if lawful, while the vessel was in *Chilian* waters, it was unlawful directly the vessel passed into *British* jurisdiction.

WILLIAMS J.—When did the false imprisonment begin?

Aspinall.—I firstly contend that it commenced the moment the prosecutors were put on board the defendant's vessel, in pursuance of the defendant's contract.

WILLIAMS J.—If the *Chilian* government have a right to do an act, why may they not do it by an *English* subject? They may employ what agent they like.

Aspinall.—At all events the false imprisonment began the moment the ship passed out of the jurisdiction of the *Chilian* government. The prosecutors

were not voluntary passengers, but unlawfully in a state of duress, placed there by the deliberate act of the defendant. They would have been justified in then seizing the vessel and taking her into the nearest port, and it would have been a perfect answer to any proceedings, whether civil or criminal, that they were escaping from unlawful custody.

ERLE C. J.—In the late case of *Regina v. Sattler* (a) the question was, whether the prisoner killed the police officer in order to release himself from unlawful imprisonment, or out of pure revenge against the person who had taken him into custody.

Aspinall.—And the killing was held to be murder, because it was out of *malice prepense*, and not with a view to escape. Assuming it had been physically possible to serve a writ of *habeas corpus* on the defendant the moment the ship passed into *British* jurisdiction, it would not have been a good return that the defendant detained the prosecutors under orders from the *Chilian* government.

Overend Q. C., for the defendant.—First, what was done in the *Chilian* territory was lawful. All countries have the right of sending their convicts to any place they please. In *Vattel*, book 1, c. 19, it is said, that a society may banish any of its members either out of the country generally, or to a particular place out of the country; although every nation has a right of refusing to admit them.

The *English* statutes, 19 *Geo.* 3. c. 74. s. 1. and 24 *Geo.* 3. c. 56. s. 1., assume that the power of banishment resides in the state by investing the Courts with power to banish offenders to any country, either within his Majesty's dominions or without; and, by statute 28 *Geo.* 3. c. 24., the king may authorize persons to make contracts for the transportation of any

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(a) Dears. & Bell's C. C. R. 525.

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offender. It will not be denied that such a contract made by the *British* government would be lawful. Every nation is mistress of her own actions, and all nations are equal (*Vattel, Preliminaires.*) The Governor of *Valparaiso* had a right, according to the law of nations, to banish the prosecutors, being *Chilians*, to *England*. Other nations ought to respect this right. "To undertake to examine the justice of a definitive sentence is to attack the jurisdiction of him who has passed it." (*Vattel*, book 2, § 84.) The *Chilian* government having the right to banish the prosecutors, it follows that the contract made by them with the defendant and what was done under that contract in *Chili* were lawful. Secondly, the contract being legal in its inception, the defendant did no act to justify this conviction after the vessel passed out of the *Chilian* jurisdiction. The prosecutors were the same as voluntary passengers for the rest of the voyage, not having protested against the ship proceeding.

WIGHTMAN J.—It must be taken that there was a general protest by the prosecutors against the whole conduct of the captain.

HILL J.—Would you contend that if the *Chilian* government had contracted to have the prosecutors conveyed to *York*, the defendant would have been justified in holding them in custody and transporting them from *Liverpool* to *York*?

Overend.—No; but here the defendant did nothing after the vessel passed out of *Chilian* jurisdiction but to prosecute his course and navigate the ship to her port of destination.

Cur. adv. vult.

The judgment of the Court was delivered, on the 28th *January* 1860, by

ERLE C. J.—In this case the question is, whether a

conviction for false imprisonment can be sustained upon the following facts.

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The prosecutor and others, being in *Chili*, and subjects of that state, were banished by the government from *Chili* to *England*.

The defendant, being master of an *English* merchant vessel lying in the territorial waters of *Chili*, near *Valparaiso*, contracted with that government to take the prosecutor and his companions from *Valparaiso* to *Liverpool*, and they were accordingly brought on board the defendant's vessel by the officers of the government, and carried to *Liverpool* by the defendant under his contract. Then, can the conviction be sustained for that which was done within the *Chilian* waters? We answer no.

We assume that in *Chili* the act of the government towards its subjects was lawful; and, although an *English* ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government, and under its authority. In *Dobree v. Napier* (a) the defendant, on behalf of the Queen of *Portugal*, seized the plaintiff's vessel for violating a blockade of a *Portuguese* port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of *Portugal*, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an *Englishman* seizing an *English* vessel, could justify the act under the employment of the Queen.

(a) 2 Bing. N. C. 781.

1860. We think that the acts of the defendant in *Chili* become lawful on the same principle, and therefore *is*
 LESLEY'S Case. no ground for the conviction.

The further question remains; can the conviction be sustained for that which was done out of the *Chilian* territory? And we think it can.

It is clear that an *English* ship on the high sea, out of any foreign territory, is subject to the laws of *England*; and persons, whether foreign or *English*, on board such ship, are as much amenable to *English* law as they would be on *English* soil. In *Regina v. Sattler* (a) this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an *English* ship at sea: the same principle has been laid down by foreign writers on international law, among which it is enough to cite *Ortolan, sur la Diplomatie de la Mer*, liv. 2. cap. 13.

The Merchant Shipping Act, 17 & 18 *Vict. c. 104. s. 267.*, makes the master and seamen of a *British* ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of *England*.

Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them, without their consent, over the sea to *England*, although he was justified in first receiving them in *Chili*, yet that justification ceased when he passed the line of *Chilian* jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to *England* is lawful

(a) *Dears. & Bell's C. C. R. 525.*

by the law of *Chili*, and that a *Chilian* ship might so lawfully transport *Chilian* subjects; but for an *English* ship the laws of *Chili*, out of the state, are powerless, and the lawfulness of the acts must be tried by *English* law.

For these reasons, to the extent above mentioned, the conviction is affirmed.

Conviction confirmed accordingly.

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REGINA v. WILLIAM PIERCE, JAMES BURGESS and WILLIAM GEORGE TESTER.

Q. B.

THE prisoners were convicted at the Central Criminal Court of feloniously stealing five hundred pounds in weight of gold, four hundred ounces of other gold, and one hundred bars of gold, the property of *The South Eastern Railway Company*, the said *James Burgess* and *William George Tester* being servants to the said Company.

The corporation of *London* claims to be entitled, under and by virtue of several charters, to the goods of persons convicted in the city of *London*, of felony committed therein.

After the conviction of the prisoners a claim was made by the undersheriffs of the city of *London* to certain property found upon them or in their possession, and, amongst other property, the *Turkish* bonds referred to in the undermentioned order; and, on the other hand, the railway Company claimed such property as being the proceeds, or as representing the proceeds, of the robbery upon their railway which

The prisoners were convicted of feloniously stealing certain property. The Judges who presided at the trial made an order directing that property found in the possession of one of the prisoners (not part of the property stolen) should be disposed of in a particular manner.

Held, that the order was bad, as a Judge has no power either at common law

or by statute to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor.

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formed the subject of the prosecution, and part of the said property was also claimed by other parties.

Thereupon, all parties were ordered to attend before MARTIN B. and WILLES J., with affidavits, setting forth the grounds upon which their claims were made, and those learned Judges ordered that the property should be handed over to Sir *Richard Mayne*, and subsequently, on 5th *January* 1858, made the following order.

Central Criminal Court, to wit.] The Queen on the prosecution of *The South Eastern Railway Company*, against *William Pierce*, *James Burgess* and *William George Tester*.

Whereas the said *William Pierce*, *James Burgess* and *William George Tester* have been at this present sessions convicted of feloniously stealing, taking and carrying away five hundred pounds in weight of gold, four hundred ounces of other gold, one hundred bars of gold, &c., the property of the said *South Eastern Railway Company*, the said *James Burgess* and *William George Tester* being at the time of the commission of the felony aforesaid servants to the said *South Eastern Railway Company*. And whereas it has been made to appear to this Court that certain *Turkish* bonds of the nominal value of 2,300*l.* now in the hands of Sir *Richard Mayne*, one of the Commissioners of Police of the metropolis, by virtue of a certain order of this Court made in the present sessions, were found in possession or power of the said *William Pierce* at the time of his apprehension for the felony aforesaid. And it has also been proved to the satisfaction of this Court that one sixth part of the said *Turkish* bonds was bought by or for the said *William Pierce* out of the proceeds of the said felony, and that the said sixth part was in fact so bought with money produced by sale of part of the said goods, chattels

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Case.

and property so stolen as aforesaid, and that the remaining five sixths of the said *Turkish* bonds were, at the time of the apprehension of the said *William Pierce* for the felony aforesaid, held by the said *William Pierce* as trustee for one *Fanny Bolan Kay* and her child. Now this Court doth order that the said Sir *Richard Mayne* do forthwith deliver the said *Turkish* bonds so in his hands as aforesaid to *John Charles Rees* the solicitor of the said Company, and that the said *J. C. Rees* and the said *South Eastern Railway Company* do, upon the receipt thereof, retain one sixth part thereof to and for the use of the said *South Eastern Railway Company*, and do forthwith settle the remaining five sixths parts thereof upon trust for the said *Fanny Bolan Kay* and her child, in such manner and form as the said *Fanny Bolan Kay* may advise.

Wilde, on behalf of the corporation of *London*, obtained a rule in the Court of Queen's Bench, calling upon the prosecutors to shew cause why this order which had been removed by *certiorari* should not be quashed.

On *Wednesday*, 2d *June* 1858.

Petersdorff Serjt. shewed cause.—The order is good. Part of this property is the proceeds of the larceny, and, as it is mixed up together with the residue, the Judges had power to dispose of the whole. It is not an order made under 21 *Hen.* 8. c. 11. or 7 & 8 *Geo.* 4. c. 29. s. 57.

LORD CAMPBELL C. J.—Those acts seems to be confined to the property which has been stolen.

Petersdorff.—But where the property in the possession of the felon is under the immediate controul of the Court, the Court has power at common law to order the disposal of it.

ERLE J.—Do you contend that *bona catalla felonum*,

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 Case.

are at the disposal of the Judge? If the property is that of the felon, I do not see how the Judge can order the disposal of it contrary to the grant of the Crown; if it is the property of some one else, the Judge has only the power by statute to order it to be restored to that person.

Petersdorff.—At common law the Judges, before whom an offender is tried, have the power of directing into whose hands the property not stolen should be placed. Where property stolen and property not the subject of felony are found indiscriminately in the possession of the felon, the Court has power to order the proportion of it.

Wilde and Sleigh, for the corporation, were not called upon.

Welsby appeared for the Crown.

Lord CAMPBELL C. J.—So much of the order as applies to five sixths of the *Turkish* bonds must be quashed. However desirable it may be that there should be such a power as has been exercised in this case, I do not think that the Judges have any such power either at common law or by statute.

Rule absolute.

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REGINA v. CHARLES HUNTLEY.

The first
 count of the
 indictment
 charged the

THE following case was reserved by the Recorder
 of *Winchester*.

prisoner with stealing certain goods and chattels; and the second count charged him with receiving "the goods and chattels aforesaid of the value aforesaid so as aforesaid feloniously stolen." After objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury and the prisoner was acquitted upon the first count, and convicted upon the second.—*Held*, that the conviction was good.

The prisoner was tried before me, as Recorder of *Winchester*, at the *Epiphany* Sessions, 1860.

HUNTLEY'S
Case.

The indictment was as follows.

City of *Winchester*, } The jurors for our lady the
to wit. } Queen upon their oath present
that *Charles Huntley* late of the parish of *Saint Maurice* in the city of *Winchester* on the sixth day of *December* in the twenty-third year of the reign of our Sovereign lady *Victoria* by the grace of God of the United Kingdom of *Great Britain* and *Ireland* Queen Defender of the Faith with force and arms at the parish of *Saint Thomas* in the city aforesaid twenty yards of tweed of the value of three pounds of the goods and chattels of *John Gadd* then and there being found feloniously did steal take and carry away, against the peace of our said lady the Queen her Crown and dignity.

And the jurors aforesaid upon their oath do further present that *Charles Huntley* late of the parish aforesaid in the city aforesaid afterwards to wit on the sixth day of *December* in the year last aforesaid at the parish aforesaid in the city aforesaid the goods and chattels aforesaid of the value aforesaid so as aforesaid feloniously stolen taken and carried away feloniously did receive and have he the said *Charles Huntley* then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen taken and carried away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

Before the prisoner pleaded, his counsel moved to quash the second count, on the ground that, by reference to the first count, it must be read as charging a felonious receiving by the prisoner of goods then stolen by him the said prisoner, the words "so as aforesaid"

1860. *HUNTLEY'S*
Case. stolen, being referable to the first count, which states the goods to have been stolen by the said prisoner; and it was contended that the count being so read was bad, as a prisoner cannot be said to have feloniously received goods stolen by himself; and *Regina v. Perkins (a)* was referred to, in which it was held that, where the evidence is sufficient to convict the accused of stealing, there is no option to treat him either as a thief or a receiver. The objection was renewed *pro formâ* at the close of the prosecutor's case, when it was objected that there was no evidence to support the second count on the same ground as above stated, viz., that the prisoner could not be found to have received goods stolen by himself.

The prisoner was acquitted upon the first count of the indictment, but found guilty upon the second count. I reserved the objection for the consideration of the Judges.

Judgment stands postponed on this indictment, and the prisoner remains in gaol, having been sentenced to nine months imprisonment on another indictment.

A. J. Stephens.

This case was considered, on 21st *January* 1860, by ERLE C. J., WIGHTMAN J., WILLIAMS J., WATSON B. and HILL J.

No counsel appeared.

ERLE C. J.—In this case the prisoner was charged in the first count of the indictment with stealing certain goods and chattels, and in the second count with receiving “the goods and chattels aforesaid, of the value aforesaid, so as aforesaid feloniously stolen.” He was acquitted upon the first count, but convicted upon the second; and it is contended that the conviction cannot be sustained, because a person cannot be

(a) 2 Den. C. C. R. 459.

said to have feloniously received goods stolen by himself. 1860.

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Case.

We are of opinion that the words in the second count, "so as aforesaid feloniously stolen," may be construed to mean simply "stolen goods," and therefore such goods as the prisoner might be convicted of receiving. "So as aforesaid" is an immateriel averment; the conviction, therefore, can be sustained.

Conviction affirmed (a).

(a) As the statute (7 & 8 Geo. 4. c. 29. s. 54.) makes the offence to consist in receiving the goods knowing them to have been stolen, the indictment need not name the principal or allege that he is unknown. In *Rex v. Jervis* (6 Car. & P. 156) the indictment was for the substantive felony of receiving stolen goods, and contained an allegation that the goods were stolen "by a certain evil disposed person," without stating the name of the principal felon or averring that he was unknown, and *Tindal* C. J. held the indictment good, saying, "The offence created by the Act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen." In *Regina v. Craddock* (2 Den. C. C. 31) the indictment in the first count

charged *A.* with stealing a promissory note from the person of *B.*; in the second count with stealing a bank note from the person of *B.*; in the third count with receiving the aforesaid goods "*so as aforesaid feloniously stolen.*" *A.* was acquitted on the first two counts and convicted on the last, and it was held, on application to arrest the judgment, that after verdict the indictment was not bad on the ground of repugnancy; because, first, the words of reference in the third count did not necessarily import a stealing of the goods by *A.* Secondly, if they did the count did not thereby become intrinsically repugnant; and after verdict the Court would resort to any possible construction which would uphold the indictment against a purely technical objection.

Considered. SURUJ-
PAUL V. THE QUEEN
[1958] 1 W.L.R. 1050

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REGINA v. HENRY HUGHES.

The first two counts of an indictment charged *A.* and *B.* jointly with stealing, and the third charged *B.* alone with receiving the stolen goods. *A.* was acquitted, no evidence having been offered against him, in order that he might be a witness against the other prisoner. Upon his and other evidence, which proved that *B.* was an accessory before the fact to the stealing and afterwards received the stolen goods, the jury found a general verdict of guilty against *B.*, which verdict was entered upon all the counts.

Held, that *B.* was not entitled to an acquittal upon the first two counts by reason of the principal, *A.*, having been acquitted, because 11 & 12 *Vict. c. 46. s. 1.* has made the being an accessory before the fact a substantive felony, and the conviction of the principal is not now a condition precedent to the conviction of an accessory.

Held also, that there was no inconsistency in the general verdict as an accessory before the fact may also be a receiver.

THE following case was reserved by the Recorder of *Manchester*.

At the Court of Quarter Sessions holden in and for the city of *Manchester*, in the county of *Lancaster*, on the 2d day of *January*, 1860.

John Hall and *Henry Hughes* were tried before me on the annexed indictment; both pleaded not guilty. After the jury were charged, the learned counsel for the prosecution said he did not propose to offer any evidence against *Hall*, and applied to have him acquitted, in order that he might be examined as a witness; and, on his assuring me that in his judgment that course would serve the ends of justice, I acceded to it, and he was acquitted, and called as the first witness.

He had been thirteen months in the service of the prosecutors, and, according to his evidence, *Hughes* first solicited him to rob his masters on the 20th or 22d of *November*, asking him if he could get him a few pounds of fents, and he would keep it dark; and to bring them to him at any time, and they would be right. That accordingly the next day he took eight pounds of patchwork, which he had stolen from his masters, to *Hughes*, who gave him half a crown for it, the selling price being 7*d.* per pound. This patchwork was afterwards found in *Hughes's* cellar (his place of business), and he stated that he had got it from *Hall*.

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 HUGHES'S
Case.

That (a) on the *Monday* following he was passing *Hughes's* place, who called him in and asked if he could get him any more of those fents; he said he could, and it was arranged between them that a person of the name of *Lowe*, who was called into the cellar, should go next day to the warehouse of *Hall's* masters, 100, *Moseley Street*, and bring the parcel he was there to get from *Hall* to *Hughes*. *Lowe*, who did not appear to be aware of the nature of the transaction between *Hall* and *Hughes*, forgot his appointment. *Hall* went the same afternoon to inquire why the man had not come; he was sent for to *Hughes's* place, and said he had got drunk and forgot it. And it was then arranged, between *Hughes* and *Hall* and *Lowe*, that *Lowe* should go to the warehouse of prosecutors, 100, *Moseley Street*, next morning, the 30th *November*, at a quarter past eight, and there receive a parcel to be given to him by *Hall*, and bring it to *Hughes*; and *Hughes* directed him to bring the parcel to his cellar (which was his place of business, and was under a public house); but if he was not in when he came with it, he was to take the parcel into that public house and leave it there for him, *Hughes*, until he returned. On the morning of 30th *November*, *Hall* opened the warehouse at a quarter past eight, and found *Lowe* there waiting for him; and about a quarter to nine *Hall* gave him a bundle of fents that belonged to his masters, and he went away with them.

A policeman on duty in the neighbourhood saw *Lowe* carrying this bundle on his shoulder, followed him, and saw him take it into the public house over *Hughes's* cellar, which was then shut; and, on going into the kitchen of the public house, he saw the bundle lying on the table there, and from the account given of it by *Lowe* he took it to the station.

(a) This applies to the 2nd count.

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Case.

Another policeman took immediate possession of *Hughes's* cellar, and waited till he came in, and asked him if he had sent a man for any goods that morning; he replied, "I have sent a man for some prints to 100, *Moseley Street*:" he was then taken into custody. The patchwork or fents found in *Hughes's* cellar, and which he said he had got from *Hall*, and the bundle of prints brought by *Lowe* from 100, *Moseley Street*, to the said public house, were identified by the prosecutors as their property.

Mr. *Wheeler* appeared as counsel for *Hughes*, and cross-examined the witnesses, and addressed the jury on behalf of *Hughes*, contending that they ought utterly to disregard every thing that *Hall* had said, and acquit his client.

I summed up the evidence, and told the jury that they alone were to decide on the credit to be given to the witnesses; but that, if they believed *Hall* to the full extent of his evidence, *Hughes* was a guilty participator in both larcenies. That if they doubted about that, they would have to consider whether they were or were not satisfied that he received the property knowing it to have been stolen. And with reference to the *fact* of the receipt of the second parcel of goods which *Lowe* was sent for by *Hughes*, with directions in case he should be out when he came to leave it for him at the said public house, and *Lowe* having done so, I told them that was as much a receipt by him as if it had been brought to him in his cellar and left there.

The jury retired at seven o'clock to consider their verdict, and I left the Court. They some time afterwards gave a *general* verdict of guilty, which was so entered. They strongly recommended the prisoner to mercy.

The question for the opinion of the Court is—

Whether, as the facts shewed that *Hughes*, if guilty at all of the larceny, was guilty only as an accessory before the fact, and *Hall*, the principal, having been acquitted, I ought not to have told the jury that *Hughes* was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only.

And if I ought so to have directed them, whether, on this *general* verdict, judgment can now be pronounced on the count for receiving.

Hughes was admitted to bail to appear and receive judgment when called upon.

R. B. Armstrong,
Recorder of *Manchester*.

COPY INDICTMENT.

City of *Manchester*, in the } The jurors for our lady
county of *Lancaster*, } the Queen upon their oath
to wit. } present that *William Hall*
and *William Hughes* late of the city of *Manchester* in
the county of *Lancaster* on the the twenty-second day
of *November* in the year of our Lord one thousand
eight hundred and fifty-nine at the city aforesaid in
the county aforesaid and within the jurisdiction of
this Court and within the space of six calendar months
from the first to the last of the several acts of stealing
charged in this indictment ten pounds weight of cotton
fents of the property of *William Henry Smith* and
another then and there being found feloniously did
steal take and carry away, against the form of the
statute in such case made and provided and against
the peace of our said lady the Queen her Crown and
dignity.

2d count. And the jurors aforesaid upon their oath
aforesaid do further present that the said *William Hall*
and *William Hughes* on the thirtieth day of *November*

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HUGHES'S
Case.

in the year aforesaid at the city aforesaid in the county aforesaid and within the jurisdiction of this Court and within the space of six calendar months from the first to the last of the several acts of stealing charged in this indictment eighteen pounds weight of cotton fents of the property of the said *William Henry Smith* and another then and there being found feloniously did steal take and carry away, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

3d count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Hughes* afterwards to wit on the same day and year aforesaid at the city aforesaid in the county aforesaid and within the jurisdiction aforesaid the property aforesaid before then feloniously stolen taken and carried away feloniously did receive and have he the said *William Hughes* then and there well knowing the same to have been feloniously stolen taken and carried away, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

William Hall, not guilty.

William Hughes, guilty.

This case was argued, on 21st *January* 1860, before ERLE C. J., WIGHTMAN J., WILLIAMS J., WATSON B. and HILL J.

Sowler appeared for the Crown, and Dr. *Wheeler* and C. H. *Hopwood* for the prisoner.

Dr. *Wheeler*, for the prisoner.—In the first two counts of this indictment *Hall* and *Hughes* are indicted as principals in the acts of theft alleged in those counts respectively; and in the third count *Hughes* alone is charged with receiving the property knowing it to have been stolen. The counsel for the

prosecution offered no evidence against *Hall*, who was acquitted, in order that he might be examined as a witness against the other prisoner, *Hughes*. He was so examined, and on his and other evidence the jury found a general verdict of guilty against *Hughes*. There is no evidence that *Hughes* acted as principal; but the whole of the evidence went to shew that he was accessary before the fact to the felonies committed by *Hall*. *Hall*, the thief, having been acquitted, there is an end of the case against the accessary before the fact.

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HUGHES's
Case.

Section 1 of 11 & 12 *Vict. c. 46.* effects an alteration in the form of pleading only, but does not alter the law with reference to accessaries before the fact; and previous to that statute the law was that the conviction of the principal was a condition precedent to the conviction of an accessary. If indicted with the principal, and the principal did not appear, the accessary was not compellable to plead; and if the principal was tried and acquitted, the accessary was entitled to an acquittal. Where the principal did appear, and pleaded the general issue, the jury were charged to inquire first of the principal, and, if they found him not guilty, then to acquit the accessary (*a*).

It cannot be pretended that there was any unknown principal here, or any other than the man who was acquitted. Upon the ground then that the principal was acquitted, this conviction must fail.

HILL J.—The preamble of 11 & 12 *Vict. c. 46.* recites that it is “expedient that any accessary before the fact to felony should be liable to be indicted, tried, convicted and punished *in all respects* like the principal, as is now the case in treason and in all misdemeanors.” The statute by the first section enacts,

(*a*) 1 Hale, 623, 624; 2 Hale, 223.

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Case.

that "If any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted and punished *in all respects* as if he were a principal felon." That enactment makes an accessory a principal felon.

As to the second point, coupling the direction to the jury with the general verdict, the conviction is bad.

The Recorder, after remarking upon the evidence as to the first two counts, told the jury that, if they doubted as to those counts, they would have to consider the evidence as to the third. He ought to have directed them that they might find the prisoner guilty of either the theft or the receiving; but, as they have found a general verdict, it is impossible to say upon which charge they have convicted the prisoner.

Sowler was not called upon by the Court.

ERLE C. J.—We are of opinion that this conviction is right, notwithstanding both the points relied upon. With regard to the first point, we think that 11 & 12 *Vict. c. 46. s. 1.* has made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory, is done away with by that enactment. Suppose the accessory is captured before the principal, he may, under the statute, at once be tried and convicted. If the principal is afterwards taken, tried and acquitted, has the accessory a right to be discharged? We are of opinion that he has no such right. Whether he is tried before or at the same time as the principal, he may be found guilty as an accessory, although the principal be acquitted.

As to the second point, looking at the evidence, there can be no doubt as to the substantial guilt of

the prisoner, and we should make every intendment in order to support the verdict.

Upon this evidence the jury might reasonably and logically convict the prisoner of stealing as an accessory before the fact, and there is no inconsistency in saying that he is guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen.

The other learned Judges concurred.

Conviction affirmed.

1860.

HUGHES'S
Case.

Stolen Goods

REGINA v. RACHAEL WARDROPER.

1860.

THE following case was reserved by MARTIN B.

The prisoner was indicted at the last *Newcastle* Assizes, together with her husband and a man called *Prishous*, for burglary and receiving. The jury found *Prishous* guilty of house-breaking, and the prisoner and her husband of receiving. The house-breaking was the breaking into a jeweller's shop at *Newcastle* and committing a very extensive robbery of the stock. The property stolen consisted, amongst a great variety of other things, of rings, watch-keys, brooches, stones for being set in brooches, and foreign coins. There was evidence of part of the stolen property being found in the house where the prisoner and her husband lived together, and other circumstances which I think warranted the jury in finding the husband guilty of re-

The prisoner and her husband and *P.* were indicted jointly for burglary and receiving. The jury found *P.* guilty of house-breaking, and the prisoner and her husband guilty of receiving.

Part of the stolen property was found in the house where the prisoner and her husband lived together, and the prisoner, in the absence of her husband, some time after the house-breaking, was seen dealing with part of the stolen things, when she made a statement importing a knowledge that they had been stolen. The Judge at the trial declined to leave it to the jury to find whether the prisoner received the stolen property from her husband or in his absence.

Held, that the conviction could not be supported.

1860.

WARD-
ROPER'S
Case.

ceiving; but, except what follows, there was no evidence which peculiarly affected the prisoner.

A young woman deposed that, some time after the burglary, the prisoner in the absence of her husband produced to her a quantity of watch-keys, brooches, stones for being set in brooches and coins, and said they were to be destroyed; that she said she had been down street changing some foreign money and thought she was going to be taken up for it; and that she asked her (the young woman) to come down if she was taken and collect the largest coins, and say a foreign captain had given them to her (she being a prostitute).

I think there was evidence that all those articles were part of the stolen property. It was also proved that at the time of the prisoner's apprehension she had upon her fingers some of the stolen rings.

At the close of the case for the prosecution it was submitted by counsel for the prisoners that, as against *Rachael Wardroper*, there was no evidence that she received the articles either in the absence of the husband or from any other person than him; and that if there was evidence for the jury, the question would be whether she received them from him, and, if not from him, whether she received them in his absence.

I ruled that there was evidence for the jury, and did not leave either of these questions to them. The jury convicted the prisoner and I thought her conviction right; but after the jury had found their verdict I was asked to inquire whether the jury found that the prisoner received the articles in question from her husband or in his absence. I declined to do so.

I request the opinion of the Court of Criminal Appeal, whether the prisoner was rightly convicted, assuming that all the other evidence as to the receiving was of such a character as to entitle her to be

acquitted by reason of her relation of wife to the other convicted receiver.

If they think she was not rightly convicted, they will please direct the prisoner to be discharged.

See *Rex v. Archer* (a).

SAMUEL MARTIN.

This case was considered, on 28th *January* 1860, by ERLE C. J., WIGHTMAN J., WILLIAMS J., MARTIN B. and CHANNELL B.

No counsel appeared.

Davidson (*amicus cur.*) mentioned the case of *Rex v. Brooks* (b) which he had referred to on the trial, he being then counsel for the prisoner. In that case the prisoner, a married woman, was indicted for receiving stolen goods. The evidence shewed that the property had been stolen by the husband from his employer where he worked and afterwards taken home and given to his wife; and the Court held that under these circumstances she could not be convicted of the offence.

ERLE C. J.—We think that the circumstances of the case authorized the prisoner's counsel to request

(a) 1 Moo. C. C. 143. In that case husband and wife were indicted jointly as receivers. The goods were found in their house. *Graham B.* told the jury that, generally speaking, the law does not impute to the wife those offences which she may be supposed to have committed by the coercion or influence of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavoured to have concealed the stolen goods more effec-

tually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence. The case was afterwards considered by the Judges, who held that, as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of her husband the conviction of the wife could not be supported, though she had been more active than her husband.

(b) *Dears. C. C. R.* 184.

1860.

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ROPER'S
Case.

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Case.

the learned Judge to put the question he desired to the jury, so that the point might be left to them for their determination. It was perfectly consistent with the facts proved that the goods might have been taken to and received by the husband at his own house, and so have come into the possession of the wife through her husband, in a manner that did not render her liable to be convicted. If the question had been left to the jury, and they had convicted the wife, the Court would have supported that conviction; but, as it was not so left, we think it more satisfactory that the conviction should be quashed.

MARTIN B.—On consideration, I think that I ought to have dealt differently with this case, and have called the attention of the jury to the law as between husband and wife. With regard to the indictment, I considered that it might be treated as an indictment jointly and severally.

WIGHTMAN J.—The charge was of a joint receiving.

CHANNELL B.—I am also of opinion that the prisoner was entitled to have the questions suggested by counsel left to the jury. I attach great importance to the fact of the charge being a joint receipt by her and her husband.

Conviction quashed.

REGINA v. JOHN DAUBNEY HIND.

1860.

The following case was reserved by KEATING J.

John Daubney Hind was tried before me at the Assizes for the county of *Gloucester*, in *March* 1860, and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one *Mary Woolford*, deceased, with intent to procure the miscarriage of the said *Mary Woolford*.

On the trial, a dying declaration of the said *Mary Woolford* was tendered in evidence on the part of the prosecution, and objected to on the part of the prisoner upon the ground that the death of *Mary Woolford* was not the subject of the inquiry.

I received the evidence, but reserved the question as to its admissibility, and respited the execution of the sentence until the Court for the consideration of Crown Cases Reserved should pronounce its decision upon the point. (See *Rex v. Baker* (a).)

If the Court should be of opinion that the evidence was not admissible, then the judgment is to be reversed, inasmuch as, without the evidence of the dying declaration of *Mary Woolford*, the prisoner could not have been convicted. If the Court shall think the evidence was admissible, then the judgment is to stand.

HENRY KEATING.

This case was argued, on 28th *April*, 1860, before POLLOCK C. B., CHANNELL B., BYLES J., BLACKBURN J. and KEATING J.

It is a general rule that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. Therefore, on an indictment for feloniously using certain instruments upon the person of a woman with intent to procure a miscarriage, the dying declaration of the woman was held inadmissible.

(a) 2 Moo. & Rob. 53.

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HIND'S
Case.

F. A. Carrington appeared for the Crown; no counsel appeared for the prisoner.

F. A. Carrington, for the Crown.—The decision in *Rex v. Mead* (a) is no doubt against the admissibility of this evidence. There the defendant, having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that rule was pending, the defendant shot the prosecutor, and, on shewing cause against the rule, an affidavit was tendered of the dying declaration of the latter as to the transaction out of which the prosecution for perjury arose; and the Court of Queen's Bench held that it could not be read, for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration (b); and in *Rex v. Hutchinson* (c), tried before *Bayley J.* at the *Durham Spring Assizes 1822*, where the prisoner was indicted for administering savin to a woman, pregnant but not quick with child, with intent to procure abortion; the woman being dead, evidence of her dying declaration upon the subject was tendered for the prosecution, but the learned Judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations

(a) 2 B. & C. 605.

(b) 2 B. & C. 608, note (a).

(c) In *Rex v. Mead*, counsel mentioned the case of *Wright v. Littler*, 3 Burr. 1244, where evidence of a dying confession by the subscribing witness to a deed was held admissible, and also a case before *Heath J.*, cited in *Avison v. Lord Kinnard* in 6 East, 195, where the confession of an attesting witness to a bond, who in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was received. *Abbott C. J.* remarked that these cases

were peculiar, inasmuch as the declarations amounted to a confession by the parties themselves of very heinous offences which they had committed, whereas the declaration of the deceased, in the case then before the Court, was for the purpose not of accusing but of clearing himself. See the observations of the Court of Exchequer in *Stobart v. Dryden*, 1 M. & W. 615, which render it at least very doubtful whether dying declarations would at the present day be admissible in any civil suit. 2 Russ. on C. & M., by Greaves, 762, note (f).

were admissible in those cases alone where the death of the party was the subject of inquiry (a). But concerning the admissibility of such evidence, under the law of *Scotland*, it is said (b): "Although, from their nature, cases of murder are the most frequent, they are not however the only cases in which this sort of evidence may be employed, as appears from what passed in the trial of *James Macgregor*, August 3rd 1752, for the abduction and forcible marrying of *Jean Key*. After being recovered out of the pannel's hands and placed with a relation of her own, that unfortunate young woman had, on the 20th of *May*, of her own accord, gone into the presence of two of the Judges (the Lord Justice *Clerk* and Lord *Drummore*) and had privately related to them the story of her sufferings, which was duly taken down in writing; and she had afterwards, in presence of the Court, confirmed and publicly adhered to this declaration. But at this time she was in an infirm and languishing condition in consequence of the grievous outrages which she had suffered; and she died before the libel was raised against the author of her distresses. To supply, therefore, as far as might be, this material defect, the prosecutor libelled on these declarations of hers as meaning to produce them by way of evidence in the trial. Accordingly, after hearing counsel, the Court allowed them to be used as circumstances of presumption against the pannel, and they were again produced, August 6th, December 27th, 1753, in the trial of *Robert Macgregor*, the associate of *James*, in this atrocious enterprize."

1860.

HIND'S
Case.

(a) 16 State Trials, 29; Hume's Commentaries on the Law of *Scotland* respecting Crimes.

(b) In trials for robbery, the dying declarations of the party robbed were held inadmissible by

Bayley J. on the Northern Spring Circuit 1822, and by *Best J.* on the Midland Spring Circuit 1822; and in *Rex v. Lloyd*, 4 Car. & P. 233, by *Bolland B.*; 2 Russ. on C. & M., by *Greaves*, 762, note (f).

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The last case in this country upon the subject was *Rex v. Baker (a)*. There the indictment against the prisoner was for the murder of *A.* by poison, which was also taken by *B.*, who died in consequence, and it was held by *Coltman J.*, after consulting *Parke B.*, that *B.*'s dying declarations were admissible. In that case the learned Judge said he would reserve the point for the opinion of the Judges, but the prisoner was acquitted.

The judgment of the Court was delivered by

POLLOCK C. B.—We are all of opinion that the dying declaration of the deceased was improperly received in evidence. The rule we are disposed to adhere to is to be found in *Rex v. Mead (b)*, where *Abbott C. J.* said: "The general rule is that evidence of this description is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration." Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of *England* which I think ought not to be extended.

Conviction quashed.

(a) 2 Moo. & Rob. 53.

(b) 2 B. & C. 606 606



Sc 8 Cas 298

REGINA v. CHARLES HALLIDAY.

1860.

THE following case was reserved by BYLES J. at the *South Wales* Spring Circuit, 1860.

The prisoner was indicted for obtaining from the trustees of the *Swansea Savings Bank*, a sum of 60*l.* by falsely pretending that a certain document produced to the bank by *Eliza Thomas*, the wife of *Daniel Thomas*, had been filled up by authority of *Daniel Thomas*, the depositor, and was a genuine document.

There was a second count founded on another false pretence, by which the prisoner was alleged to have obtained, by another document produced by the said *Eliza Thomas*, a further sum of money.

There was a third count for a conspiracy between the prisoner and *Eliza Thomas* to cheat the savings bank.

It appeared that an authority to receive the money had been filled up by another witness at the instance of the prisoner; that *Eliza Thomas*, the wife of the depositor, had presented it and obtained the money, and that the prisoner had afterwards eloped with *Eliza Thomas*. On the apprehension of the prisoner, a large sum of money was found in his possession.

The evidence of *Daniel Thomas*, the depositor, was essential to the prosecution, in order to shew that he had given no authority to fill up the document or to withdraw the deposit.

The jury found the prisoner guilty on the first count, and not guilty on the second and third counts.

Held: 1. That the evidence of *D.* was properly received in proof of the first count, his wife not being indicted, although she was alleged to be one of the parties to the conspiracy charged in the third count.

2. That finding the prisoner guilty on the first count was consistent with finding him not guilty on the third count.

The prisoner was charged in the first count of an indictment with obtaining money from the trustees of a savings bank, by falsely pretending that a document presented to the bank by the wife of *D.* had been filled up by the authority of *D.*; and in the third count of the same indictment, the prisoner was charged with conspiring with the said wife of *D.* to cheat the bank. The evidence of *D.* was received, in proof of the first count, to shew that he had given no authority to fill up the document or to withdraw the deposit.

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It was objected, on behalf of the prisoner, that although the wife of *Daniel Thomas* was not included in the charge, yet he was not an admissible witness to prove her guilty of a conspiracy, nor even to prove the counts for false pretences. (See *Regina v. Gleed (a).*)

I thought his evidence admissible on all the counts. In deference, however, to the high authority of Mr. Justice *Littledale* and Mr. Justice *Taunton*, I reserved the point, and suggested that the counsel for the prosecution should consent to a verdict of acquittal on the last count.

The counsel for the prisoner then objected that an acquittal on the last count was inconsistent with a verdict of guilty on the first count. The jury, however, found the prisoner guilty on the first count, and not guilty on the second and third counts.

I reserved these questions:

First.—Whether the husband's evidence was properly received in proof of the first count.

Secondly.—Whether there is any necessary inconsistency in the finding on the first and third counts.

The prisoner's sentence was deferred, but the prisoner remains in custody.

J. BARNARD BYLES.

This case was considered, on 28th *April*, 1860, by

(a) Cited 2 Russ. on C. & M., by Greaves, 983. In that case (which was tried at *Gloucester* Lent Assizes 1832), on an indictment for stealing wheat, *Eliza Ellis* was called on the part of the Crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; *Taunton J.* doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband

by causing a charge to be made against him. Having consulted *Littledale J.*, his Lordship said:—"Here the evidence would directly charge the husband with being a principal, and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received."

POLLOCK C. B., CHANNELL B., BYLES J., BLACKBURN J. and KEATING J. 1860.

HALLIDAY'S
Case.

No counsel appeared.

The judgment of the Court was delivered by

POLLOCK, C. B.—The question is whether the evidence of the husband was admissible in support of the first count. His evidence, no doubt, tended to shew that his wife had acted unlawfully and criminally; but the first count contains no charge against the wife; and indeed, on this indictment, she was not charged at all, although she was involved in the conspiracy charged against the prisoner in the third count. Though that is so, it does not prevent the husband's evidence from being admissible. We are also of opinion that, although the prisoner was acquitted on the third count for conspiracy, it does not necessarily follow that the conviction on the first count was wrong.

Conviction affirmed.

REGINA *v* FRANCIS LOOSE.

1860.

THE following case was reserved by WILLIAMS J. at the *Norwich March* Assizes, 1860.

In this case the indictment alleged that on the 20th of *July*, 1859, the prisoner became and was bailee of to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank he applied it to his own purposes. He was indicted for stealing as bailee of the money of the treasurer, and also for a common law larceny, the money being laid as that of the treasurer.

The Friendly Societies Act, 18 & 19 *Vict. c.* 63. s. 18., vests the property of such societies in the trustees, and directs that in all indictments the property shall be laid in their names.—*Held*, that the prisoner could not under these counts be convicted either as a bailee or of a common law larceny.

The prisoner, who was a trustee of a friendly society, was appointed by a resolution of the society

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Case.

monies of *Richard Carraway*, deceased, to the amount of 40*l.*, and that, being such bailee, he fraudulently and feloniously did take and convert the said monies to his own use, and that the prisoner in manner and form aforesaid, feloniously did steal, &c., the said monies. There was another count for a common law larceny.

The deceased *Richard Carraway*, whose money the 40*l.* was alleged to be, was at the time in question the treasurer of a lodge of Odd Fellows, which was a friendly society duly enrolled. The prisoner was one of its trustees. On the 20th of *July*, 1859, at a lodge meeting, it was proposed and resolved that 40*l.* should be sent to the bank of Messrs. *Gurney*, at *Fakenham*, and that the prisoner should take it there. The 40*l.* in gold and silver was taken from a box, which was in *Carraway's* keeping, as treasurer, by a person who acted for him, and, having been counted, was put into a bag and carried away by the prisoner. Instead of taking it to the bank, he dishonestly applied it to his own purposes, and no such sum was ever placed to the credit of the society.

On these facts it was submitted, by the counsel for the prisoner, that the money was not shewn to be the property of *Richard Carraway* as alleged in the indictment. *Cain's Case* (a), it was argued, did not apply, because that case was decided on the construction of the statute 10 *Geo.* 4. c. 56., by which the property of a friendly society was vested in the *treasurer* or trustee for the time being, whereas by the Act now in operation (stat. 18 & 19 *Vict.* c. 63. s. 18.) the property is vested in the trustee or trustees of the society. And that, supposing the treasurer to have a special property in the 40*l.*, such property ceased as soon as the resolution of the lodge meeting was acted

(a) 2 Moo. C. C. R. 204; S. C. Car. & M. 309.

upon by payment of the money into the hands of the prisoner, who was nominated by the lodge, and not the treasurer, to carry it to the bank. It was further urged that, independently of the statutes, assuming the treasurer to be the owner, the prisoner received the money, not as the servant of the treasurer, but as a person not bound to take it; and he was therefore only guilty of a breach of trust. Lastly, it was agued that the prisoner was not bound to pay in that particular 40*l.*, but any sum of 40*l.* would have sufficed, whereas by the statute he must hold something specific.

The prisoner was convicted, but I respited the judgment, until the opinion of this Court should be taken whether the above objections were well founded.

EDW. VAUGHAN WILLIAMS.

1860.

Loose's
Case.

This case was argued, on 28th *April*, 1860, before POLLOCK C.B., CHANNELL B., BYLES J., BLACKBURN J. and KEATING J.

No counsel appeared for the Crown, and *Metcalfe* (*Drake* with him) appeared for the prisoner.

Metcalfe, for the prisoner.—The property is not well laid in *Richard Carraway*, the treasurer. The case of *Rex v. Cain* (*a*), relied upon at the trial on the part of the prosecution, is not in point. That was the case of a benefit society enrolled under the 10 *Geo.* 4. c. 56. and the 4 & 5 *Wm.* 4. c. 40., and it was held that the property of the society might in an indictment be laid to be in the treasurer by his proper name, under sect. 21 of the 10 *Geo.* 4. c. 56., which provides that the property in such societies, “for all purposes of action or suit, as well civil as criminal,” should be deemed and taken to be, and in every such proceeding where necessary stated to be, the property of the “treasurer or trustee of such society for the

(*a*) 2 Moo. C. C. R. 204; S. C. Car. & M. 309.

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Case.

time being *in his or her proper name*, without further description." But the Act now in force relating to friendly societies is the 18 & 19 *Vict. c. 63.*, which, by sect. 18, vests the property of such societies in the trustees, and directs that in all actions, or suits, or indictments, or summary proceedings before magistrates touching or concerning any such property, the same shall be stated to be the property of the persons for the time being holding the office of trustees in their proper names as trustees of such society without any further description; so that *Richard Carraway*, being treasurer only, and not a trustee, had no property vested in him by virtue of the statute. The prisoner was in law the owner of the money. The general property was in the trustees, of whom the prisoner was one; and whatever special property the treasurer may at any time have had was taken from him when the resolution of the society, to hand the money to the prisoner, was made, and when the money was handed to him pursuant to such resolution.

The judgment of the Court was delivered by

POLLOCK C. B.—We are all of opinion that the conviction on the indictment in this form cannot be sustained. In *Cain's Case* the prisoner had obtained the money of the society wrongfully, and the property in it was rightly laid in the treasurer, in whom it was vested by the statute then in force, 10 *Geo. 4. c. 56.*; but in this case the money was not vested in the treasurer, but in the trustees, of whom the prisoner was one, and he was specially appointed by a resolution of the society to take the money to the bank. It therefore cannot be said that he stole the money, the property of the treasurer, as charged in the indictment. As soon as the treasurer parted with the money he had nothing more to do with it. The pri-

soner may have been guilty of a breach of trust as against the other trustees; but it cannot be said that he stole the money of the treasurer. The conviction, therefore, cannot be sustained.

1860.

Loose's
Case.

Conviction quashed.

REGINA *v.* SAMUEL HUDSON, JOHN SMITH,
and JOHN DEWHIRST.

1860.

THE following case was reserved by the deputy for the Recorder of *York*.

At the *Epiphany* Sessions, 1860, held for the city of *York*, the prisoners were jointly indicted and tried before me upon an indictment the first two counts of which charged them with an offence under 8 & 9 *Vict. c. 109.*, as follows. 1st count charged: that on the 18th *November*, 1859, by fraud, unlawful device and ill practice in playing at a certain game or sport, to wit in and by a wager with one *Abraham Rhodes* whether a certain pencil-case had a pen in it or not, unlawfully and fraudulently they did win from the said *Abraham Rhodes* to a certain person, to the jurors unknown, a certain sum of money, to wit 2*l.* 10*s.*, of the money of the said *Abraham Rhodes*, and so did then and thereby unlawfully obtain such money from the said *Abraham Rhodes* by a false pretence, to wit by the fraud, unlawful device and ill practice aforesaid,

The three prisoners being in a public house with the prosecutor, one of them, in concert with the other two, placed a pencil-case on the table and left the room. Whilst he was absent one of the two remaining took the pen out of the case and put a pin in its place, and the two prisoners induced the prosecutor to bet with the other prisoner, when he re-

turned into the room, that there was no pen in the case, and the prosecutor staked fifty shillings. On the pencil-case being turned up another pen fell into the prosecutor's hand, and the prisoners took the money.

Held, that the evidence supported a conviction upon a count charging the three prisoners with conspiring by divers false pretences and fraudulent devices to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the prisoners if he could.

Semble, that the facts did not amount to the offence of cheating at play within section 17 of 8 & 9 *Vict. c. 109.*

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Case.

with intent then to cheat and defraud the said *Abraham Rhodes* of the same, against the form of the statute in such case made and provided, &c.

The second count charged the prisoners that they unlawfully and fraudulently did combine, confederate and conspire together, and with divers other persons to the jurors unknown, by fraud, unlawful device, and ill practice in playing at a certain game or sport, and by divers other fraudulent devices and false pretences, unlawfully to win from the said *Abraham Rhodes* a certain sum of money, to wit the sum of 2*l.* 10*s.*, of the money of the said *Abraham Rhodes*, and so then and thereby unlawfully to obtain from the said *Abraham Rhodes* the said sum of money in this count mentioned by a false pretence, with intent then to cheat and defraud the said *Abraham Rhodes* of the same, against the form of the statute, &c.

By a third count the prisoners were charged with a conspiracy to cheat in the following form.

That they unlawfully and fraudulently did combine, confederate and conspire together, with divers other persons to the jurors unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from the said *Abraham Rhodes* the sum of 2*l.* 10*s.* of the money of the said *Abraham Rhodes*, and unlawfully to cheat and defraud the said *Abraham Rhodes* of the same, against the peace, &c.

The evidence disclosed that the three prisoners were in a public house together with the prosecutor *Abraham Rhodes*, and that, in concert with the other two prisoners, the prisoner *John Dewhirst* placed a pen-case on the table of the room where they were assembled, and left the room to get writing paper. Whilst he was absent, the other two prisoners *Samuel Hudson* and *John Smith* were the only persons left drinking

with the prosecutor, and *Hudson* then took up the pen-case and took out the pen from it, placing a pin in the place of it, and put the pen that he had taken out under the bottom of the prosecutor's drinking glass, and *Hudson* then proposed to the prosecutor to bet the prisoner *Dewhirst*, when he returned, that there was no pen in the pen-case. The prosecutor was induced by *Hudson* and *Smith* to stake fifty shillings in a bet with *Dewhirst*, upon his returning into the room, that there was no pen in the pen-case, which money the prosecutor placed on the table and *Hudson* snatched up to hold. The pen-case was then turned up into the prosecutor's hand, and another pen with the pin fell into his hand, and then prisoners took his money.

1860.

Hudson's
Case.

Upon this evidence it was objected, on behalf of the prisoners, that no offence within the meaning of the 8 & 9 *Vict. c. 109.* was proved by it, and that the facts proved in evidence did not amount to the offence charged in the third count. I thought the objection well founded as to the offence under the 8 & 9 *Vict. c. 109.*, but held that the facts in evidence amounted to the offence charged in the third count, and directed the jury to return a separate verdict on each count, a case having been asked for by the prisoner's counsel for the consideration of the Court for Crown Cases Reserved.

The jury returned a verdict of guilty on each of the three counts. The prisoners were sentenced to eight months imprisonment, and committed to prison for want of sufficient sureties.

If the Court for the Consideration of Crown Cases Reserved shall be of opinion that the above facts in evidence constituted in law any one of the offences charged in the indictment, and was evidence to go to the jury in support thereof, the verdict is to stand for

1860. such of the counts in which the offence is laid to
 HUDSON'S which the evidence applies.
 Case.

J. B. Maule, sitting for the
 Recorder of *York*.

This case was argued, on 28th *April*, 1860, before
 POLLOCK C. B., CHANNELL B., BYLES J., BLACKBURN J.
 and KEATING J.

Price appeared for the prisoners ; no counsel ap-
 peared for the Crown.

Price, for the prisoners.—The first two counts of
 the indictment are framed upon the Gaming and Wa-
 gers Act, 8 & 9 *Vict. c.* 109. s. 17., which enacts “that
 every person who shall, by any fraud or unlawful
 device, or ill practice in playing at or with cards, dice,
 tables or other game, or in bearing a part in the
 stakes, wagers or adventures, or in betting on the
 sides or hands of them that do play, or in wagering
 on the event of any game, sport, pastime or exercise,
 win from any other person to himself, or any other or
 others, any sum of money or valuable thing, shall be
 deemed guilty of obtaining such money or valuable
 thing from such other person by a false pretence, with
 intent to cheat or defraud such person of the same,
 and being convicted thereof shall be punished accord-
 ingly.” This provision was intended to meet the
 ordinary games played at common gaming houses,
 and was not intended to apply to tricks of this
 nature.

POLLOCK C. B.—You may confine your argument to
 the third count.

Price.—That count charges a conspiracy to obtain
 the money by false pretences. At the trial the case was
 likened to that of *Rex v. Bernard (a)*, where a person
 at *Oxford*, who was not a member of the University,

(a) 7 Car. & P. 784.

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Case.

went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case however was nothing more than a bet on a question of fact, which the prosecutor might have satisfied himself of by looking at the pen-case.

It is not found as a fact that the prisoners had prepared the pen-case, or that they knew that the second pen was in it. This was merely a bet on a sort of conjuring trick or sleight of hand.

BLACKBURN J.—The prisoners cheated the prosecutor into the belief that he was going to bite, when in fact, he was going to be bitten.

Price.—This is a mere deceit not concerning the public, which the criminal law does not regard, but is a deceit against which common prudence might have guarded. There was no false pretence on which any one of the prisoners alone could have been convicted of obtaining money by false pretences; and if so, the conviction cannot be supported.

POLLOCK C. B.—Why not? This is a count for conspiracy to cheat.

Price.—Yes, by false pretences.

POLLOCK C. B.—There are rules of law applicable to false pretences which do not apply to conspiracy.

CHANNELL B.—If the count had omitted the words “by false pretences,” it would have been good.

BLACKBURN J.—If proof was given of an agreement by fraudulent devices to obtain the money, which is the substance of the third count, is there not evidence for the jury?

Price.—If the prosecutor is a party to the fraud, he cannot maintain an indictment. In this case the prosecutor intended to cheat the prisoners.

The judgment of the Court was delivered by

1860.

HUDSON'S
Case.

POLLOCK C. B.—We are all of opinion that the conviction upon the third count is good, and ought to be supported. The count is in the usual form. The expression “by false pretences” used in it is not to be construed in the technical sense contended for by the counsel for the prisoners. We think that there was abundant evidence of a conspiracy to cheat. Though it be an ingredient in that conspiracy to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment.

Conviction affirmed.

LR 10 Ck 252, 281

REGINA v. JOHN BRADFORD, RICHARD JAMES BRADFORD, JOHN BUTLER, HENRY DURBAN, GEORGE DIMENT, JOSEPH DIMENT and FREDERICK CLEAVER.

1860.

A railway truck was placed by the defendants across a line of railway so as to obstruct the passage of any carriage, and to

THE following case was reserved at the *Middlesex* Sessions by the Assistant Judge.

John Bradford, Joseph Diment, Frederick Cleaver, Richard James Bradford, John Butler, Henry Durban and George Diment were tried before me at the General Sessions of the Peace for the county of *Middlesex*,

and to endanger the safety of any persons conveyed therein; but its position was discovered, and the truck removed before any collision took place.

The line of railway was constructed under the powers of an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by the power of steam; but, at the time of the alleged offence, the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and of workmen.

Held, that the so placing the truck across the line was an offence within section 15 of 3 & 4 *Vict. c. 97*, although the line was not opened and no actual obstruction took place.

holden at *Westminster* on the 7th day of *May* 1860, upon an indictment of which the following is a copy. 1860.

Middlesex, to wit.] The jurors for our lady the Queen upon their oath present that *John Bradford*, *Richard James Bradford*, *John Butler*, *Henry Durban*, *George Diment*, *Joseph Diment* and *Frederick Cleaver* on the 8th day of *April* in the year of our Lord 1860 at the precinct of *Norwood* in the county of *Middlesex* unlawfully and wilfully did do a certain thing that is to say unlawfully and wilfully (a) did then and there put and place a certain truck called a trolley upon and across a certain railway there called *The Great Western and Brentford Railway* in such manner as to obstruct a certain engine to wit a locomotive steam-engine then and there using the said railway, against the form of the statute in such case made and provided.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *John Bradford*, *Richard James Bradford*, *John Butler*, *Henry Durban*, *George Diment*, *Joseph Diment* and *Frederick Cleaver* afterwards to wit on the same day and in the year aforesaid at the precinct aforesaid in the county aforesaid unlawfully and wilfully did do a certain thing that is to say unlawfully and wilfully did then and there put and place a certain truck called a trolley upon and across the said railway called *The Great Western and Brentford Railway* in such manner as to obstruct a certain carriage to wit a railway carriage then and there using the railway, against the form of the statute in such case made and provided.

3rd count. And the jurors aforesaid upon their oath

(a) The word "wilfully" in the statute means no more than designedly, and it is not necessary to shew that the defendant did the act

expressly with the object of obstructing the carriages, &c.: *Reg. v. Holroyd*, 2 M. & Rob. 339,

1860. aforesaid do further present that the said *John Brad-*
ford, Richard James Bradford, John Butler, Henry
BRADFORD'S *Durban, George Diment, Joseph Diment and Frederick*
Case. *Cleaver* on the said 8th day of *April* in the year of our
Lord 1860 at the precinct aforesaid in the county
aforesaid unlawfully and wilfully did do a certain
thing that is to say unlawfully and wilfully did then
and there put and place a certain truck called a trolly
upon and across the said railway called *The Great*
Western and Brentford Railway in such manner as to
endanger the safety of persons conveyed in the said
carriage, against the form of the statute in such case
made and provided.

4th count. And the jurors aforesaid upon their oath
aforesaid do further present that the said *John Brad-*
ford, Richard James Bradford, John Butler, Henry
Durban, George Diment, Joseph Diment and Frederick
Cleaver afterwards to wit on the same day and in the
year aforesaid at the precinct aforesaid in the county
aforesaid unlawfully and wilfully did do a certain
thing that is to say unlawfully and wilfully did then
and there put and place a certain truck called a trolly
upon and across the said railway called *The Great*
Western and Brentford Railway in such manner as to
endanger the safety of persons conveyed upon the said
railway, against the form of the statute in such case
made and provided.

The prisoners severally pleaded guilty, and judgment was respited until the decision of the Court for the Consideration of Crown Cases Reserved was obtained upon the case hereinafter stated.

John Bradford, Joseph Diment and Frederick Cleaver were committed to the House of Correction for the county of *Middlesex*, and the other prisoners were discharged on recognizance of bail to appear and receive judgment at future sessions.

The indictment was framed upon the statute 3 & 4

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Case.

Vict. c. 97., by the 15th section of which it is enacted that every person who shall wilfully do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, shall be guilty of a misdemeanor. By the 21st section of the same Act it is enacted that whenever the word railway is used in this Act, it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam, or by any other mechanical force.

The railway in question was constructed under the powers of an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by the power of steam, but at the time of the committing the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and of workmen who were from time to time conveyed upon the railway in carriages drawn by the power of steam. A railway truck was placed by the prisoners across the railway, and was so placed as to obstruct the passage of any carriage, and to endanger the safety of persons conveyed therein, but its position was discovered and the truck removed before any collision occurred.

It was objected that upon these facts the case was not within the statute, because, 1st. The railway was not used for the conveyance of passengers for hire. And 2ndly. That no actual obstruction took place.

I overruled both objections, and I have now to submit to the Justices of either Bench and Barons of the Exchequer whether I was right in so doing.

W. H. Bodkin,

Assistant Judge.

1860.

BRADFORD'S
Case.

This case was argued, on 2nd *June* 1860, before
COCKBURN C. J., MARTIN B., CROMPTON J., BRAMWELL
B. and WILLES J.

Digby appeared for the Crown, and *Ribton* for the
defendants.

Ribton, for the defendants.—Section 21 of the 3 & 4
Vict. c. 97. enacts that the word “railway” shall be
construed to extend to all railways “intended for the
conveyance of passengers.” Here the railway at the
time of the commission of the alleged offence was not
used for the conveyance of passengers. The preamble
of the statute shews that it was passed for the protec-
tion of the public, the words being “whereas it is ex-
pedient for the safety of the public to provide for the
due supervision of railways;” and the provisions are
all aimed at the prevention of accidents to the public.
There was no intention on the part of the Legisla-
ture to control a railway contemplated, but not yet
made. Until the railway was completed and opened,
the works remained a mere private enterprise and
private property as much as if they were in a private
garden. The word “intended,” in section 21, does
not necessarily mean *in futuro*, but merely means
intended at the time when the railway is constructed
and finished; and this view is consistent with the
preamble. If the word “intended” meant “intended
from the date of the first step,” it would lead to
absurd consequences; for it might be held that after
the first sod was turned, and though no line was yet
laid down, this stringent penal statute would apply to
every obstruction put upon the contemplated line.

COCKBURN C. J.—Suppose a railway is not finally
completed and not opened, but is ready to be opened,
and a trial trip is taken, and some one wilfully puts
some obstruction on the line, would that be within
the Act of Parliament?

Ribton.—That would be nearer than this case; but I should contend that it would not be within the statute. 1860.

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CROMPTON J.—If the works had only been partly laid down it might not be within the statute, which speaks of it as a railway.

Ribton.—This was not a complete railway. It could not be opened for the public, for the Government inspector had to inspect it previously.

BRAMWELL B.—Suppose there had been a goods train only, and an obstruction had been put on the line, would that have been within the Act?

Ribton.—I should say not. That, however, assumes that there is a complete railway opened and used. Here it was not so, and there were no passengers to be endangered.

COCKBURN C. J.—Still there was one carriage and engine upon the line. We must take it that it has been constructed and is intended to be used, though not actually opened. This is within the mischief of the Act.

Ribton.—This is a highly penal statute, and the Court will not give a construction to the word “intended” which would bring within the Act all those who put anything on the line after the first sod had been taken up. The second objection is that there was no actual obstruction. In order to bring the offence within the statute there must be some train or engine actually obstructed.

MARTIN B.—You say that, if a person puts a stone or a piece of iron on a line of railway, it is no offence within the statute unless and until some engine is actually obstructed.

CROMPTON J.—The statute says “shall wilfully do or cause to be done anything in such manner as to obstruct.” Does not that mean if the obstruction is

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put in such a place and such a manner that any engine coming along may be obstructed?

Ribton.—That is not the plain meaning of the words which by my contention are only meant to apply to a case where a person shall actually obstruct an engine or carriage. The offender must either actually obstruct an engine or carriage, or *endanger the safety of persons conveyed; whether a thing does endanger is a question for the jury; but here there were no persons conveyed within the meaning of the statute. The only persons carried along the line were workmen for the private convenience of the contractor. They were not passengers or persons conveyed for hire, whom the statute was passed to protect.

COCKBURN C. J.—Surely the workmen are “persons conveyed.”

Ribton.—The meaning of the words seems to be “passengers for hire.” It could not be said where there is a train of goods and nobody but the guard or driver is with it, and there is an obstruction, that that would be within the statute.

COCKBURN C. J.—If there are a guard and stoker only on the train, would they not be “persons conveyed in or upon the same” within the statute?

Digby, for the Crown, was not called upon by the Court.

COCKBURN C. J.—I am of opinion that there is really no difficulty in this case. We must assume as a fact that the railway was completed, and that all that required to be done was to open it for the public traffic. In the meantime, and before this final stage, the workmen were occasionally conveyed to and from particular spots on the line where their presence was necessary in order to complete it, and make all ready for the purpose of the line being thrown open. The question is, whether persons who placed obstructions

on the line, under these circumstances, committed an offence under section 15 of 3 & 4 *Vict. c. 97*.? It appears the parties were mere boys, and it might be a question whether it was worth while to prosecute; still the prosecution was instituted, and we are to take the facts as they are stated. The prisoners did put an obstruction on the line, and they put it in such a position as to endanger the safety of the persons conveyed. I am of opinion that such a case comes within both branches of the alternative stated in the section. There was an obstruction put on the line, and it was put so as to endanger the safety of the persons conveyed. It was contended by the counsel for the prisoners, that there can be no obstruction until some train be absolutely obstructed; but such a construction cannot be maintained. The object of the Legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such manner as was likely to cause such disaster. The case is therefore within the intention of the statute; and though, in the ordinary course of things, it would generally be after the railway was fully opened that the public required to be protected; yet an obstruction before that time is within the mischief as well as the words of the statute. The conviction must be affirmed.

The other learned Judges concurred.

Conviction affirmed (a).

(a) As to the circumstances under which an offence of this character becomes a felony, see

14 & 15 *Vict. c. 19. ss. 6. 7.*; *Regina v. Court*, 6 Cox C. C. 202.

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REGINA *v.* JOB TIMMINS.

The defendant was convicted on an indictment, framed upon 9 *Geo. 4. c. 31. s. 20.*, for taking an unmarried girl under sixteen out of the possession of her father, and against his will. It was proved that the prisoner (who had previously stayed out with the girl for a night) having met her by arrangement, stayed with her away from her father's house for three days, sleeping with her at night; that he took her away without her father's consent and against his will, in order to gratify his passions and then allow her to return home; but not with a view of keeping her away from her home permanently. *Held*, that the evidence justified the conviction.

THE following case was reserved and stated by the Common Serjeant of the city of *London*.

The prisoner was indicted at the *September Sessions*, 1860, holden for the jurisdiction of the Central Criminal Court, under the stat. 9 *Geo. 4. c. 31. s. 20.*, for that he, on the 19th *August*, 1860, at the parish of *All Saints, Poplar*, did unlawfully take and cause to be taken one *Ann Butler*, an unmarried girl under the age of sixteen years, to wit of the age of fourteen years and five months, out of the possession and against the will of *Isaac Butler*, her father, he the said *Isaac Butler* then and there having the lawful care and charge of her, against the form of the statute, &c., and against the peace, &c.

The statute enacts that if any person shall unlawfully take, or cause to be taken, any unmarried girl being under the age of sixteen years, out of the possession, and against the will, of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor.

It was proved on the trial that, on the 17th *August*, the prisoner, who is a married man, living with his wife, asked the girl, *Ann Butler*, if she would mind going out with him on the *Sunday*, to which she answered "No." He was previously well known to her, and she had, on a former occasion, stayed out and

Held, that the evidence justified the conviction.

slept with him for a whole night, away from her home. On *Sunday* the 19th *August*, in fulfilment of the engagement, she went and met the prisoner near *Poplar Church*. They went to *London* together, and spent three days in visiting places of public entertainment, sleeping together at night, and on *Wednesday* morning, the 22d *August*, on getting up, the prisoner said to her, "I'll go to work, and you go home." They then separated, and the girl returned home.

The father of the girl swore that his daughter was absent without his knowledge and against his will.

In answer to questions which I left to them, the jury found that the father did not consent, and that the prisoner knew he did not consent; that the prisoner took the girl away with him in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away from her home permanently.

Upon this finding I postponed the judgment, in order to have the opinion of the Court upon the case, and the question for the Court is, whether, on the facts so found, any offence has been committed under the statute.

The prisoner, being unable to procure bail, remains in custody.

Thomas Chambers,
Common Serjeant.

This case was argued, on 10th *November*, 1860, before ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

Sleigh appeared for the Crown. No counsel appeared for the prisoner.

Sleigh, for the Crown.—The conviction was right. Sect. 20 of stat. 9 *Geo.* 4. c. 31., upon which this indictment is framed, must be read in connection with sections 19 and 21. It is clear that sect. 20 does not contemplate the necessity of the taking being permanent in order to constitute the offence. Whenever a

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person takes a girl of that age against her parents' consent, and severs the possession of the parent, he is guilty of the crime contemplated by the section.

CROMPTON J.—Would you say that the section would apply to the case of a person taking away a girl for the purpose of converting her? Or if a man makes a sign to a girl in her father's cottage, and she comes out and goes away with him for a short time, would that be within the section. Is it not a question of degree?

Sleigh.—Each case must be judged according to its peculiar circumstances. The cases put might fall within the meaning of the section.

CROMPTON J.—In the case first put by me, there might be a permanent taking; but supposing the section not to apply exclusively to the taking away of a child for the purpose of defiling her, would it apply if the purpose were to take a child to the play?

Sleigh cited *Regina v. Meadows* (a), *Regina v. Mankletow* (b) and *Regina v. Hopkins* (c).

CROMPTON J.—In *Regina v. Mankletow* the parties went away without the intention of returning.

BRAMWELL B.—The important question is, what is the meaning of "possession of the father?"

Sleigh.—I submit that the offence is committed where the possession is severed, so that the father no longer has the care and control of the daughter. The evidence in this case is sufficient to support the conviction.

ERLE C. J.—We are of opinion that the conviction must be affirmed. The statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such

(a) 1 Car. & Kir. 399.

(b) 1 Dears. C. C. R. 159.

(c) Car. & Marsh. 254.

cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father? The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as, in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think that the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the father's possession. In our judgment, therefore, the jury were justified in their verdict by the evidence before them, which we consider to be the point submitted to us, although the prisoner did not intend the taking to be permanent, but when his lust was gratified, intended to cast the girl from him. We limit our judgment to the facts in this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed her father's threshold, as when she is taken away with the intention of keeping her away permanently; but we mean it to be understood that, although we affirm this conviction, we do not intend to say that a person would be liable to conviction under the section if it should appear that the taking was intended to be temporary only, or for a purpose not inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence.

The other learned Judges concurred.

Conviction affirmed.

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REGINA v. THOMAS NEWELL HOLT.

The prisoner was charged with obtaining moneys from *H.* by false pretences. He was employed by his master to take orders for goods, but was not authorized to receive the money. Eleven days after he was so employed he obtained the money mentioned in the indictment from *H.* by falsely representing that he was authorized by his employer to receive it. For the purpose of proving the intent of the prisoner, evidence was admitted of his having, on a day not specified but within a week from the time when the moneys were obtained from *H.*, obtained another sum of money from another person by a similar false pretence, such obtaining not being charged in the indictment.—*Held*, that the evidence was not admissible.

THE following case was reserved and stated by the Chairman of the Quarter Sessions for the West Riding of *Yorkshire*.

At the General Quarter Sessions of the Peace for the West Riding of the county of *York*, holden at *Leeds*, on *Monday* the 15th day of *October* 1860, the defendant *Thomas Newell Holt* was tried upon an indictment charging him with the misdemeanor of having obtained the sum of 9s. 9d. from *William Hirst* by false pretences.

It appeared in evidence that the defendant was employed on the 19th day of *April*, by one *Luke Uttley*, to take orders for goods, but was not authorized, but forbidden, to receive money on behalf of *Luke Uttley*, nor did he at any time pay over or account for any moneys received to *Luke Uttley*.

That on the 13th day of *April* the defendant obtained from *William Hirst* the sum of 9s. 9d. charged in the indictment, by the representation that he was authorized by the said *Luke Uttley* to receive that sum on his behalf for goods delivered in pursuance of an order taken by the defendant.

The counsel on the part of the prosecution tendered the evidence of one *Samuel Uttley* to the effect that, on a day not specified, but within a week from the said 13th day of *April*, the defendant obtained from him the said *Samuel Uttley* the sum of 11s by a like

obtained another sum of money from another person by a similar false pretence, such obtaining not being charged in the indictment.—*Held*, that the evidence was not admissible.

representation that he (the defendant) was authorized by the said *Luke Uttley* to receive money on his behalf for goods delivered in pursuance of a like order taken by the defendant, such last mentioned obtaining not being charged in or in any way referred to in the indictment.

The counsel for the prisoner objected that the evidence so tendered was inadmissible. I held, as Chairman, however, that such evidence was admissible for the purpose of proving the intent of the prisoner when he committed the acts charged against him in the indictment. I therefore received the evidence, but reserved the question whether it was properly admitted for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoner was convicted, and sentence of imprisonment for four calendar months in the House of Correction at *Wakefield*, with hard labour, was passed upon him, and he is now admitted to bail to render himself in execution.

The question for the opinion of the Court is:

Whether the evidence of *Samuel Uttley* was or was not rightly admitted.

The case was considered, on 10th *November* 1860, by ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

No counsel appeared.

ERLE C. J.—This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us in saying that the evidence was admissible.

The other learned Judges concurred.

Conviction quashed.

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Case.

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REGINA v. BURNSIDES.

The indictment charged that the prisoner obtained twenty

yards of carpet by falsely pretending that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him about some carpet and had asked him to procure a piece of carpet; whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of carpet.

The evidence was that the prisoner obtained twenty

yards of carpet by stating to the prosecutor, who was a shopkeeper in the village of S., that he wanted some carpeting for a family living in a large house in the village who had had a daughter lately married; that the prisoner afterwards sold the carpeting so obtained to two different persons; and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent the prisoner to the prosecutor's shop for the carpet.—*Held*, that there was a sufficient false pretence alleged and proved, and that it was sufficiently negatived by the evidence.

THE following case was reserved and stated by the Chairman of the Sessions for the North Riding of *Yorkshire*.

At the Midsummer Quarter Sessions for the North Riding of *Yorkshire*, holden at *Northallerton*, on the 3d day of *July* 1860, *John Burnsidess* was indicted for obtaining a piece of carpet under false pretences.

The following is a copy of the indictment.

North Riding of the	} The jurors for our lady the
county of <i>York</i> ,	
to wit.	{ Queen upon their oath present
	{ that <i>John Burnsidess</i> on the 8th

day of *May* in the year of our Lord one thousand eight hundred and sixty unlawfully knowingly and designedly did falsely pretend to one *George Stonehouse* that a certain person who lived in a large house down the street and had had a daughter married some time back had been at him the said *John Burnsidess* about some carpet and had asked him the said *John Burnsidess* to procure a piece of woollen carpet to wit about twelve yards by means of which said false pretences the said *John Burnsidess* did then unlawfully obtain from the said *George Stonehouse* twenty yards of woollen carpet of the goods and chattels of the said *George Stonehouse* with intent thereby then to defraud, whereas in truth and in fact no such person

as aforesaid had then or at any other time been at the said *John Burnsides* about any carpet nor had any such person as aforesaid asked the said *John Burnsides* to procure any piece of woollen carpet whatsoever, to the great damage and deception of the said *George Stonehouse* to the evil example of all others in the like case offending, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

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Case.

The evidence was that the prisoner went to the prosecutor's shop in the village of *Snainton*, and stated that he wanted some carpeting for a family living in a large house in that village, who had had a daughter lately married. Upon this the prosecutor gave the prisoner about twenty yards of carpeting, which the prisoner afterwards sold in the neighbourhood to two different persons at a higher price than that which the prosecutor would have charged. The only evidence to negative the false pretence charged in the indictment was that of a lady living in the village of *Snainton*, whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor's shop for the carpet.

At the close of the case for the prosecution, the prisoner's counsel objected that the indictment did not sufficiently allege any false pretence: that upon the evidence there was nothing to go to the jury, and thirdly, that the false pretence alleged in the indictment had not been sufficiently negated by the prosecution.

The Court decided that there was a sufficient false pretence alleged in the indictment, and that there was evidence to go to the jury in support of it.

The jury returned a verdict of guilty.

The judgment of the Court was reserved until the

1860. opinion of the Court for the Consideration of Crown
 BURNSIDES'S Cases Reserved could be taken on the points raised by
 Case. the prisoner's counsel.

The opinion of the Court is therefore requested on the points reserved.

The prisoner was discharged on recognizance of bail to appear at the next *Epiphany* Sessions to receive the judgment of the Court.

Cathcart, Chairman.

This case was considered, on the 10th day of *November*, 1860, by ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

No counsel appeared.

Per CURIAM.

Conviction affirmed.

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REGINA v. CHARLES GUELDER.

The prisoner was convicted upon an indictment for embezzlement. It was the duty of the prisoner, who was the

THE following case was reserved and stated by
 WILDE B.

At the Summer Assizes 1860, for the county of *York*, *Charles Guelder* was tried before me and found guilty on two counts charging him with embezzlement.

assistant overseer of a township, to collect the rates ; and the course was upon receipt to pay them into a bank to the account of the overseers, and then to obtain the overseers' receipts for the sums so paid. It was his duty also to enter the rates when received in a book, and at the audit he charged himself by the entries in his book and discharged himself by the receipts of the overseers.

Having misappropriated certain moneys which he duly entered in the book when received, he fraudulently obtained from the overseers receipts for the several sums stated in the indictment by falsely telling them that he had paid the money into the bank. These receipts he produced to the auditor, and so deceived him as to his having handed over the moneys.—*Held*, that the prisoner was rightly convicted, and that the fact of his entering the sums, when received, in his book did not alter the character of his offence.

For the purposes of this case the conviction of *Charles Guelder* is to be deemed and taken to be a good conviction, unless the facts about to be stated do not in law constitute the crime of embezzlement.

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Case.

The prisoner was assistant overseer of the township of *Bradfield*, and such servant as stated in the indictment.

It was the prisoner's duty, as such servant, to collect the rates from the ratepayers of the township.

The course was for the prisoner upon receiving any rates to pay them into a neighbouring bank to the account of the overseers, and then to obtain from the overseers, or one of them, a receipt, in a printed form signed by such overseer, for such sum so paid to their account.

The prisoner also kept a book in which it was his duty to enter from time to time the various sums received by him.

At the audit, which took place half-yearly, the accounts thus entered as received by the prisoner were contrasted with the receipts given to him by the overseers.

He charged himself by the book, and discharged himself again by the overseers' receipts.

The above being the course of business, the prisoner in the month of *May* in the present year, on the day of , and just previous to the audit for the half-year, went to two of the overseers and obtained from them several receipts for various sums, the sums stated in the indictment.

He obtained these receipts fraudulently by stating that he had paid the said sums into the bank to the overseers' account, which in truth he had not. He had in fact previously appropriated the said sums to his own purposes; and he obtained the receipts with the view of deceiving the auditor as to his having

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Case.

handed the monies over to the overseers. He produced the receipts at the audit, and was successful.

But he had duly and properly entered the said sums when received in the aforesaid book, and had thus openly charged himself with the receipt of them.

It was contended that, having thus charged himself with the receipt of the money, he could not be guilty of embezzlement.

The prisoner was convicted and sentenced, but I reserved for the consideration of this Court the following question: Could the prisoner on the above facts be lawfully convicted of the crime of embezzlement?

JAMES WILDE.

This case was considered, on 10th *November*, 1860, by ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

West appeared for the Crown, but was stopped by the Court; no counsel appeared for the prisoner.

ERLE C. J.—The conviction must be affirmed. It is perfectly clear that the money was embezzled and that the offence was committed with one of the ordinary concomitants of fraud, fraudulently accounting. There is no reason for doubting the propriety of the conviction. The question submitted to us is, whether the prisoner is entitled to be acquitted because he made a correct entry of the sums when received in his book: I think not. Those entries were probably made with forethought and a view to the defence.

The other learned Judges concurred.

Conviction affirmed.

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REGINA v. GEORGE OLIVER.

1860.

So 600 Cr Cas 382. 9 Id 93

THE following case was reserved and stated by the Chairman of the *Northumberland Sessions*, held at *Alnwick*, on the 17th day of *October*, 1860.

The prisoner *George Oliver* was indicted at these Sessions for a misdemeanor, of which indictment the following is a copy :

Northumberland, } The jurors for our lady the
to wit. } Queen upon their oath present
that *George Oliver* on the eighteenth day of *August* in the year of our Lord one thousand eight hundred and sixty unlawfully and maliciously did inflict upon one *Robert Bainbridge* some grievous bodily harm, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *George Oliver* afterwards on the said eighteenth day of *August* in the year aforesaid unlawfully did make an assault in and upon the said *Robert Bainbridge* and did then unlawfully beat wound and ill-treat the said *Robert Bainbridge* and did thereby then unlawfully occasion actual bodily harm to the said *Robert Bainbridge* and then did other wrongs to the said *Robert Bainbridge*, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

Upon this indictment the jury returned a verdict of "guilty of a common assault."

Upon a count for assault-
ing, beating,
wounding
and occasion-
ing actual
bodily harm,
against the
statute, a pri-
soner may be
convicted
of a common
assault.

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Case.

An objection was taken by the counsel for the prisoner that this finding amounted to an acquittal, and he moved in arrest of judgment.

The Court thereupon postponed the judgment and reserved the following question of law, which had so arisen on the trial, for the consideration of the Justices of either Bench and Barons of the Exchequer, under the provisions of the statute of the 11 & 12 *Vict. c. 78.*, viz. Whether this conviction can be sustained? And in the meantime it was determined that the prisoner be committed to the common gaol at *Morpeth*, until he shall enter into a recognizance, himself in 50*l.* and two sureties in 25*l.* each or one in 50*l.*; conditioned to appear at the Court of Quarter Sessions to be holden for the county of *Northumberland*, next after he shall have notice given to him by the prosecutor, to receive the judgment of this Court, if it should be empowered to pass any such judgment.

This case was considered, on 10th *November*, 1860, by ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

No counsel appeared.

The Court held that the conviction could be sustained on the second count.

Conviction on the second
count affirmed.

REGINA v. JAMES TONGUE.

1860.

THE following case was reserved and stated by the Recorder of *Birmingham*.

At a Court of General Quarter Sessions, held at *Birmingham*, on the 11th day of *January*, in the year of our Lord 1860, before me, *James Tongue* was charged with embezzlement. The prisoner pleaded not guilty. The jury found their verdict against the prisoner.

The facts were these. The prisoner was secretary to a money club held at the house of *Joseph Whiles, Johnson's Head Inn, Birmingham*. The rules of the club which were printed, and a copy given to each member, were (as far as they are material to the present case) as follows:

Rule 2. That payment of one night's instalment shall constitute any person a member approved of by this society, who may subscribe for one or more shares. Club night to mean every alternate Monday.

Rule 9. Two of the members shall act as stewards for one quarter in rotation as their names appear on the books.

Rule 10. Three members shall be appointed for one quarter, to make inquiries as to the sufficiency of the sureties proposed, who shall make their report on the following club night. That the said committee shall be exempt from standing as stewards in rotation.

legal proceedings. The note was payable to the treasurer's order, and the defendant indorsed the treasurer's name on the note and employed an attorney, who issued a writ at the suit of the defendant. In consequence of the action money was paid to the defendant by one of the makers of the note, the receipt of which the defendant denied, and fraudulently withheld the money from the club and appropriated it.

Held (Crompton J. dubitante), that the defendant was rightly convicted.

The defendant, who was convicted of embezzlement, was secretary of a money club. His duties were cognate to that of receiving money, although the receipt of money was not expressly named as one of them in the rules, which were in writing. The defendant was directed by the club to sue upon a joint promissory note their property or get better security, and the note was handed to him by the treasurer, not a member of the club, who desired that his name should not be used in

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Case.

Rule 12. It shall be the duty of the secretary, when any important business requires it or the society thinks proper, to summon, by circular, all the members to a special meeting.

Rule 17. That Mr. *Tongue* (the prisoner) be appointed secretary to this society, who shall receive for his services a fair remuneration to be decided by the members, and shall be exempt from paying the refreshment money. He shall make the promissory notes on demand, and shall always be one of the committee: should he not attend or send a proper person to act for him, he shall forfeit 1s. 6d.

Rule 21. Mr. *Joseph Whiles* shall act as trustee during the pleasure of the society, who shall sign all orders upon the treasurer for payments. All cheques or orders upon the treasurer to be countersigned by the secretary.

Rule 14. All monies belonging to this Society shall be lodged in the district bank, and the proprietor of the house be deputy treasurer (during the club's pleasure) to take all monies amounting to 10*l.* and upwards to the said bank to be deposited by him thus: "No. 4, Fifty pounds Society held at Mr. *Joseph Whiles, Johnson's Head Inn, Edmund Street.*" The bank book to be laid before the society each club night.

Rule 23. No alteration shall be made to these articles, unless notice thereof be given according to article 12, and such alteration be approved of by a majority of the members then present.

The practice of the club was for the stewards to receive the payments of members, and to pay over such monies to the deputy treasurer *Joseph Whiles*, and for *Whiles* to retain in his hands all the monies and securities belonging to the club, the notes being pasted in the book called the bond book, which remained in the custody of *Whiles*. In the month of

April, 1857, a promissory note was made by one *Brough* as principal, and by *Starkey* and *Adcock* as co-sureties, for the sum of 50*l.*, payable to the order of *Joseph Whiles*, which said note the property of the club was, by order of the club, taken out of the bond book, and handed to the prisoner by *Whiles*. In consequence of doubts as to the solvency of the makers of the note in question, the prisoner was directed by the club then in meeting assembled to sue upon the note so handed to him by *Whiles*, or get better security for the money which had been advanced upon it. At the time when the note was handed to the prisoner, *Whiles* desired that his name should not be made use of in any legal proceedings. After receiving the note, the prisoner endorsed it with the name of *Whiles*, and employed an attorney, who issued a writ against the makers of the note at the suit of the prisoner. In consequence of the action so brought, *Adcock*, one of the joint makers of the note, paid to the prisoner two several sums of 30*l.* and 10*l.*, the monies charged in the indictment. *Henry Jenkins* and the other parties mentioned in the indictment, except *Whiles*, were members of the club. *Whiles* was not a member. The prisoner, on several occasions after the receipt of the monies in question, denied such receipt, and alleged, in answer to inquiries made, that he had not received the money on the note, but had obtained a better security from *Brough*. It was proved that the prisoner had received these several monies. The prisoner after the receipt of the monies in question returned the note to *Whiles* as unpaid, and the note was repasted in the bond book. I put the following questions to the jury. 1st. Did the prisoner receive the monies in question? 2nd. Ought he to have paid them over to the club? 3rd. Did he withhold them from the club fraudulently? And the jury specially found each of such

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1860. questions against the prisoner, and also found him
TONGUE'S guilty generally.
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The Court, having grave doubts of the validity of a conviction on the evidence above set forth, respited judgment and discharged the prisoner upon bail.

The questions are:

1. Was the prisoner a clerk or servant within the meaning of stat. 7 & 8 *Geo. 4. c. 29. s. 47.*, or was he a person employed for the purpose of receiving the money in question, or was he a person employed in the capacity of a clerk or servant?

2. Was the money in question received by the prisoner by virtue of his employment or in his capacity of a clerk or servant?

3. Was the money in question received by the prisoner for or in the name or on the account of his master or masters?

M. D. Hill, Recorder.

This case was argued, on 10th *November*, 1860, before ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

O'Brien appeared for the Crown, and *Gibbons* for the prisoner.

Gibbons, for the prisoner.—The prisoner did not receive the money as clerk or servant within the meaning of the statute. It was not his duty as secretary to receive the money, and in this case he was especially directed to sue, the property in the note being given to him for the purpose. The entire transaction authorized him to do what was necessary to sue—as to employ an attorney and to incur costs. The indorsement of *Whiles's* name, and the delivery of the note to the prisoner, passed the property in the note with its accessories. When the action was commenced, it was the prisoner only who could have

entered satisfaction on the roll, or released the cause of action.

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HILL J.—Was not the indorsement of *Whiles's* name necessary to make him owner? The prisoner himself wrote *Whiles's* name upon the note.

Gibbons.—There was a delivery of the note to the prisoner by *Whiles*, and that must, on the principle of the maxim “omnia præsumuntur rite esse acta,” be taken to be a good delivery, and made for the purpose of passing the property in the note to him. If he had indorsed *Whiles's* name fraudulently, it would have been a forgery; but it is not disputed that the prisoner had the authority of *Whiles* to sue upon it. He could only sue upon the note as attorney, or as the holder; not being qualified to sue as attorney, he could only sue as principal and owner of the note. The club had divested themselves of all legal proprietorship in the note which they had ever possessed, and only retained an equitable right to it. The prisoner's title to the note gave him title to the proceeds, which, when received, became his own property, subject only to the equitable rights of the club. In *Regina v. Harris* (a) the prisoner, being the miller at the county gaol, received and ground grain at the county mill contrary to the usual practice, and appropriated the money for the grinding; and it was held he could not be convicted of embezzlement, as the conclusion to be drawn from the facts was that he had made an improper use of the mill by grinding the corn for his own benefit, and consequently that he did not receive the money for or on account of his masters. It could not be said that the money was received to the use of the club, for before handing it over the defendant had a right to deduct the costs for

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which he had a lien on the sums received. At best he was but a bare trustee for the club; and although he might have been made liable in equity, a Court of law, *quâ* Court of law, could not have given any remedy to the club in respect of the proceeds of the note.

O'Brien, for the Crown.—All the elements of embezzlement are present in this case. The prisoner was the servant and secretary of the club; and although he was not expressly charged by the rules to receive monies for the club, still, he being their servant, if he once received money as such, that was sufficient for his conviction. In *Rex v. Hughes (a)*, where a drover was employed in a single instance to drive a cow and calf to a person to whom they were sold, and to bring back the money they were sold for, he was held to be a servant within the meaning of the Act. *R. v. Jenkins (b)*, *Spencer's Case (c)*. *Hall's Case (d)* shews that the prisoner, being secretary only, only held the note in the capacity of servant of the club, in which the property remained. The club was merely a money club, without legal property. The defendant was told to take the proper means to recover the amount, and the suit was mere machinery for that purpose. There was no obligation upon him to incur personal liability for costs.

BRAMWELL B.—For what I can see in the case, the defendant had no authority to employ an attorney. He was told to sue for the club.

O'Brien.—It cannot be competent to a servant by an Act of his own to vest his master's property in himself. The property in the note, therefore, remained in the club, and the proceeds were received for and on

(a) Ry. & Moo. 370.

(b) 9 Car. & P. 38.

(c) Russ. & Ry. 299.

(d) Ry. & Moo. 474.

account of the club. The argument that, by indorsing *Whiles's* note contrary to *Whiles's* authority, the prisoner could transfer the property in the note and proceeds to himself is fallacious.

Gibbons, in reply.—The note having been handed to the defendant to sue upon, there was an authority to him to do that which was necessary for that purpose.

ERLE C. J.—I think that this conviction ought to be affirmed. The first question put to us is, if the prisoner received the money in question as a clerk or servant? Now he was the secretary of the club with a salary. His duties are detailed in the rules sent to us; and although he was not specifically charged with the duty of receiving money for the club, he had several duties to perform cognate to the receiving of money, namely to make applications for interest or instalments due, and for better security or part payment. If the ordinary duties of a person in the employ of another are proximately connected with the receiving of money, the receipt of money for his employer and appropriation of it to his own use would make him liable to the charge of embezzlement. It was so laid down in *Spencer's Case* (a). And it is sufficient if there was a specific employment to receive money on one occasion only. The case, therefore, seems to me to fall within the statute as far as the employment as a servant was concerned. Then, was he within the statute as far as relates to the receipt of the money? Had he a right to the repayment of the loan and to hold the money as collateral security for the costs? If this had been a mere loan, and the prisoner had been sent to apply for the money or for better security, I think there would have been no doubt that the receipt would have been to the use of

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(a) Russ. & Ry. 299.

1860. the club. The strength of Mr. *Gibbons's* argument
TONGUE'S was, that the prisoner had a cause of action on the
Case. promissory note. Now what passed between the club
and the prisoner had not the effect of passing the absolute property in the note to him as against the club. That gave only a limited authority, namely to sue upon it. As between him and the club, there is nothing to shew that they authorized him to receive the money and become the absolute owner of the note; and I take the finding of the jury to have answered in the affirmative the question put to us—"Was the money received by the prisoner for or in the name or on the account of his master or masters?" The jury have found that the prisoner had no lien on the money in the capacity of plaintiff, or as making himself liable to the costs of the action. The conduct of the prisoner is clear; he was acting fraudulently, for when asked about it he declared, on several occasions, that he had not received the money on the note.

CROMPTON J.—I am somewhat in the situation of the learned Recorder, and entertain a doubt of the propriety of this conviction. It is not pretended that the prisoner received the money by virtue of his general authority, but my brother *Erle* has used the right expression—that the receipt in this case was something cognate to the general duty of the prisoner.

It has been held, that if a prisoner received money as a clerk or servant on one particular occasion, that would do. My doubt is, whether the money was received by virtue of any of the duties for which the prisoner was employed. There being a discussion about the payment of the note, it was handed over to the prisoner; and *Whiles* desired that his name should not be made use of in any legal proceedings upon it. The prisoner then indorsed the note with the name of

Whiles. It would be too much to say that by so indorsing it he was guilty of forgery, and I think we ought to treat the note as properly indorsed to the prisoner. The prisoner then employed an attorney to sue upon the note. My doubt is whether he was a clerk or servant when he was suing in his own name upon the note. Can we consider him as the mere machinery used by the club? The transaction was one *per se*, and not of every day occurrence, and the law of embezzlement is not to be extended to cases not cognate to the general employment as clerk or servant. This circumstance of suing on the note made it desirable to throw that duty upon the prisoner, which he accepted. I also have some doubt whether the prisoner can be said to have received the money for the use of the club. Being the plaintiff in the suit, I should have thought that he received it for himself to hand over the balance after deducting the costs. Of the moral guilt of the prisoner I have no doubt.

BRAMWELL B.—I think the conviction ought to be affirmed. If I could discover any finding of a definite set of duties to be performed by the secretary, of which the receipt of money was not one, I should share the doubt of my brother *Crompton*; but I do not see here that the duties of secretary were inconsistent with that of receiving money. The secretary's duty is definitely specified. Many very miscellaneous duties may be implied from the nature of the office, and I think it was consistent with those duties for the prisoner, when directed by the club, to receive money. I think that he was employed by the club, and that that fact is concluded by the finding of the jury. I cannot think that he received the money for himself, or that the law proceedings make any difference. The bringing of the action was mere machinery to obtain the money, and the money, when received by the prisoner, was

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received by him on account of the club. The prisoner sued that he might receive the money for the club, his masters; and if he made himself liable for costs, of which I see no evidence, he had, as far as I can see, no right to incur them. He was not authorized to employ an attorney. I am of opinion that the prisoner is shewn to be the servant of the club, for whom he received the money which he embezzled.

CHANNELL B.—The prisoner stood in the relation of clerk or secretary to the club. The office of secretary alone might not carry with it authority to receive money for the club; but here it is found that the club directed the prisoner to sue upon the note or get a better security, and *Spencer's Case* (a) is an authority to shew that a duty to receive money in a single instance is sufficient. The suit was mere machinery for obtaining the money for the club.

HILL J. concurred in affirming the conviction.

Conviction affirmed.

(a) Russ. & Ry. 299.

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REGINA v. HENRY SPARROW.

The indictment in one set of counts charged the defendant with an assault upon the prosecutor, and having thereby unlawfully and maliciously inflicted grievous bodily harm upon him. There was also a count for a common assault.

THE following case was reserved and stated by the Recorder of *Birmingham*.

After evidence of grievous injuries, the Recorder told the jury that there was evidence of grievous bodily harm, and that the question of whether the defendant intended to inflict grievous bodily harm did not arise.

The jury found a verdict of "guilty of an aggravated assault without premeditation; it was done under the influence of passion."

Hereupon the Recorder directed a verdict of guilty to be entered upon the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm.

Held, that the Recorder rightly directed the verdict to be so entered.

The defendant was tried at the *Michaelmas* Quarter Sessions of the Peace for the borough of *Birmingham*, on an indictment, charging him in one set of counts with an assault upon one *Samuel Griffiths*, and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon the said *Samuel Griffiths*. The indictment contained also a count for a common assault.

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It was proved in evidence before me that, on the 6th day of *September*, 1860, the prosecutor was standing in a shop in *High Street, Birmingham*. The defendant passed and saw the prosecutor there. The defendant came and stood on the step of the shop for a few minutes till the prosecutor was leaving. The defendant then handed to the prosecutor a letter and asked him to read it. The prosecutor declined to do so and was going away. The defendant then struck the prosecutor with his fists two violent blows upon the mouth, another blow on the temple, and a fourth on the back of the ear. The prosecutor retreated backwards, the defendant following him up and striking at him. The prosecutor then struck the defendant a blow over the hat with a stick. In retreating, the prosecutor's foot slipped against the kerb-stone, and he fell heavily upon his side. The defendant went to him, wrenched the stick from him and then went away.

The prosecutor and the medical witnesses described the injuries which the prosecutor thereby sustained as follows:—Three of his front teeth and other teeth further up the jaw were loosened, his gums were lacerated, and the mouth was swollen. The pain under which the prosecutor was suffering immediately after the accident was stated by the medical witness to be insufferable. One of the front teeth and the back teeth have since partially fastened, but the two front

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teeth have not done so, and the prosecutor must lose the same. The mouth and jaw remained sore and stiff, so that the prosecutor could not eat solid food for more than a week. His nervous system received a shock, from which he suffered so, that the medical men at an interval of sixteen days advised his going away from business for a time; and he received an injury on his side, from which he had felt, and at the time of the trial (9th *October*) was still feeling, pain.

I told the jury, that the injuries inflicted upon the prosecutor, as described by the medical witnesses and the prosecutor himself, fell within the definition of "grievous bodily harm," and that, if they believed the witnesses, there was evidence to support the first count (or set of counts) in the indictment; and, in reply to a question from the jury, I explained to them that the question of whether the defendant intended to inflict grievous bodily harm upon the prosecutor did not arise, in this case, but that the simple point for their consideration was, "did the defendant unlawfully assault the prosecutor, and thereby inflict upon him grievous bodily harm?"

The jury returned the following verdict. "We find the defendant guilty of an aggravated assault, but without premeditation; it was done under the influence of passion."

It was contended on the part of the defendant that that finding amounted to a verdict of guilty upon the count for the common assault only. I held otherwise, and directed a verdict of guilty to be entered upon the first set of counts.

And the question I submit for the consideration of the Court is, Was I right in so holding?

M. D. Hill, Recorder.

This case was argued, on the 10th day of *December*,

1860, before ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

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Ballantine Serjt., (*Adams* and *O'Brien* with him), appeared for the Crown ; and *Huddleston* Q. C., (*A. Wills* with him), for the prisoner.

Huddleston Q. C., for the prisoner.—The offence charged in the first set of counts has not been found by the jury. Those counts are framed *ex* ther upon 10 *Geo.* 4. c. 34. s. 29., or 14 & 15 *Vict.* c. 19. s. 4. Section 4 of 14 & 15 *Vict.* c. 19. enacts, that “Whereas it is expedient to make further provision for the punishment of aggravated assaults, be it enacted that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the Court to be imprisoned, with or without hard labour, for any term not exceeding three years ; provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the 29th section of the 10 *Geo.* 4. c. 34.” The jury have not found the prisoner guilty of assaulting with intent to commit grievous bodily harm, but only of an aggravated assault. An aggravated assault does not necessarily mean one accompanied by grievous bodily harm. It would be an “aggravated assault” to strike a person and spit at him ; but such evidence as that would not support these counts.

HILL J.—Why are we to suppose a finding contrary to the facts, when the verdict the jury have found is consistent with those facts?

CROMPTON J.—We must construe the finding by reference to the subject matter of the charge, and what was left to the jury.

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Huddleston Q. C.—The jury may, consistently with the facts, have intended not to find the prisoner guilty of intending bodily harm, but only of an aggravated assault. The Recorder did not tell the jury that bodily harm and assault were the same thing. The injuries suffered by the prosecutor might amount to grievous bodily harm, but the jury by their finding have negatived malice and premeditation ; and intention is a necessary ingredient in the offence. It is the same with this offence as in arson, which in the absence of malicious intention cannot be established.

BRAMWELL B.—The defendant strikes a blow which is calculated to cause grievous bodily harm, and which does cause it.

HILL J.—You make no distinction between “premeditation” and “intention,” between intentionally doing an unlawful act and causelessly doing it.

CROMPTON J.—Here I think we must take it that the prisoner intended to do the act.

Huddleston Q. C.—The word “maliciously” is used in the statute, which means something more than intentionally.

The counsel for the Crown were not called upon by the Court.

ERLE C. J.—We are of opinion that this conviction must be affirmed. Objection is taken to the language in which the jury returned their verdict ; but it is very rare that language can be met with which may not be perverted. We must construe the language used by the jury by looking at the circumstances under which the verdict was returned. The question before the jury was whether the prisoner committed a common assault, or an assault with intent to do grievous bodily harm. That question was discussed before them, and an explanation of what the statute meant given by the Recorder ; and then the jury

say, "We find the prisoner guilty of an aggravated assault." It is impossible, to my mind, for any one to have entered anything on the record in respect to that finding other than what has been entered. We are of a different opinion to Mr. *Huddleston*, and think this assault was intentional in the understanding of the law, though committed without premeditation and under the influence of passion. We therefore think the Recorder was authorized in directing the verdict to be entered as he has done.

Conviction affirmed.

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REGINA v. JAMES CRAWSHAW.

1860.

THE following case was reserved and stated by the Chairman of the *Lancaster* Quarter Sessions.

At the General Quarter Session of the Peace for the county of *Lancaster*, holden by adjournment at *Salford* in the said county, on the 27th, 28th and 29th days of *August*, in the year of our Lord 1860, *James Crawshaw* was tried upon the following indictment.

County of *Lancaster*, to wit.] The jurors for our lady the Queen upon their oath present that *James*

By the 1st section of 10 & 11 Wm. 3. c. 17., lotteries are declared to be common and public nuisances. The 2d section, which came into operation on a subsequent day, rendered persons keep-

ing lotteries liable to a penalty, to be sued for by information or action. Statute 42 Geo. 3. c. 119. contains similar enactments with regard to lotteries called "Little-goes."

Held, on motion in arrest of judgment, on an indictment for keeping a lottery, containing counts framed upon the above mentioned statutes, that the counts were good and the offence indictable.

The defendant kept an eating-house, and sold tickets for what was called "*The Great Eastern Money Club*," in respect of which prizes were drawn, and the holders of the tickets, whose numbers were drawn for prizes, received the same; and the defendant delivered out the prizes to such ticket holders.

Held, that this evidence was sufficient to support a conviction against the defendant for keeping a lottery, but not sufficient to support a conviction for keeping a room for betting upon horse racing under the 16 & 17 Vict. c. 119.

The jury returned a verdict of guilty, but recommended the defendant to mercy on the ground that perhaps he did not know that he was acting contrary to law.

Held, that the conviction was not invalidated by this addition to the verdict.

1860. *Crawshaw* on the twenty-eighth day of *July* in the year of our Lord one thousand eight hundred and sixty and on divers other days and times between that day and the taking of this inquisition at the borough of *Ashton-under-Lyne* in the county of *Lancaster* unlawfully did set up keep and maintain a certain lottery to wit a Little-go, to the great damage and common nuisance of all the liege subjects of our said lady the Queen there inhabiting and residing and to the evil example of all others in the like case offending and against the form of the statutes in such case made and provided, and against the peace of our said lady the Queen her Crown and dignity.

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2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *James Crawshaw* on the said twenty-eighth day of *July* in the year of our Lord one thousand eight hundred and sixty and on divers other days and times between that day and the taking of this inquisition at the borough of *Ashton-under-Lyne* aforesaid unlawfully did set up conduct and maintain a certain lottery not authorized by Parliament in which said lottery prizes were awarded to the subscribers thereto for whom certain numbers were drawn, to the great damage and common nuisance of all the liege subjects of our lady the Queen there inhabiting and being and to the evil example of all others in like case offending and against the form of the statutes in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

3rd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *James Crawshaw* on the said twenty-eighth day of *July* in the year of our Lord one thousand eight hundred and sixty and on divers other days and times between that day and the taking of this inquisition at the borough of *Ashton-under-Lyne* aforesaid did unlawfully open

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keep and use a certain room in a certain house to wit a house in *Old Street* in the said borough which said room and house were then occupied by him the said *James Crawshaw* for the purpose of money being received by the said *James Crawshaw* then being the occupier of such room as aforesaid as the consideration for securing the paying by some other persons to wit *The Great Eastern Money Club* of money on the event of a certain horse race, to the great damage and common nuisance of all the liege subjects of our lady the Queen therein inhabiting being residing and passing to the evil example of all others in like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

4th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *James Crawshaw* on the said twenty-eighth day of *July* in the year of our Lord one thousand eight hundred and sixty did unlawfully open keep and use a certain room in a certain house to wit a house in *Old Street* in the said borough which said room and house were then occupied by him the said *James Crawshaw* for the purpose of money being received by the said *James Crawshaw* then being the occupier of such room as aforesaid as the consideration for an undertaking by him the said *James Crawshaw* to pay money on the contingency of horse races, to the great damage and common nuisance of all the liege subjects of our lady the Queen there inhabiting being residing and passing to the evil example of all others in like case offending against the form of the statute in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

5th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *James*

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Crawshaw on the said twenty-eighth day of *July* in the year of our Lord one thousand eight hundred and sixty and on divers other days and times between that day and the taking of this inquisition did unlawfully set up keep maintain and conduct a lottery not authorized by Parliament, to the common nuisance of all the liege subjects of our lady the Queen and to the evil example of all others in like case offending contrary to the form of the statute in that case made and provided, and against the peace of our said lady the Queen her Crown and dignity.

The first witness who was called was *John Preston*; his evidence was as follows:—

I am a police constable of the borough of *Ashton-under-Lyne*; I know the defendant; he lives in *Old Street, Ashton-under-Lyne*, and keeps an eating-house there. On *Saturday*, the 28th *July* last, I saw in his window a placard, a large one; after seeing it I went into his house, his wife was there, and the defendant was there in the shop-place also; I said, "I want a horse ticket." I was not in uniform; his wife gave me one out of a drawer: I paid sixpence for it. I asked her. When and where do they draw? She said, "It will be drawn on *Monday* night, where I do not know; it is not drawn regularly at the same place." I then came away; defendant was present all the time. On *Monday* afternoon, the 30th day of *July*, I went again, defendant and his wife were in, I bought another horse ticket; his, defendant's, wife served me from the same drawer: I paid sixpence for it. I asked when and where it would be drawn: defendant's wife said, "To-night, but I do not know where." I purchased the same day a list, this is it (the list is annexed, marked B.), I paid a halfpenny for it. I examined it, to look whether my ticket purchased on the first occasion was a prize. In consequence of what

I saw there I went the next morning, *Tuesday* the 31st, to the defendant's house and took with me the first ticket I had bought, I gave it to the defendant and said, "There is a prize for this," and gave it to him; he went into the kitchen as if to look whether it was so; returned and gave me four shillings and tenpence. I asked him why he did not give me the five shillings, he only laughed; my other ticket was not a prize. I afterwards gave it to Chief Constable *Dalglish*, this is it (this ticket is annexed, marked A.). Both the tickets were for the same drawing.

Cross-examined.]—I went to the defendant's by direction of my Superintendent, I went alone. I can't say whether defendant knew me, I had then been a police constable at *Ashton-under-Lyne* but a few weeks; the first time I went was at half-past 4 P.M. on the *Saturday*: I saw no one there the first time but the defendant and his wife.

The next witness called was *William Chadwick*, whose evidence was as follows:—

I am an Inspector of Police at *Ashton-under-Lyne*. On *Thursday*, the 2nd of *August* last, I apprehended the prisoner under a warrant. I went to his place and found there four placards stuck up in the window; (the four placards are annexed and marked respectively with the letters C., D., E., F.). I asked defendant to give me what tickets he had, and his wife handed me from a drawer in the counter these tickets now produced, (the tickets so taken from the drawer and produced in Court purported to be tickets in two different money clubs, *White's South Union Weekly Money Club*, and *The Great Eastern Money Club*); these tickets were not each on separate pieces of paper but a number printed in succession on the same slip of paper, but so as to be easily separated one from the other; there were seventy-six in all produced, fifty-

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six in the first above mentioned, and twenty in the last above mentioned club. A few tickets of each are annexed, marked respectively with the letters H. and I.

This, with some formal evidence, closed the case for the prosecution.

The counsel for the defendant contended that the 1st, 2nd, and 5th counts of the indictment were bad in substance; that an indictment did not lie either under the statute 10 & 11 *Wm. 3. c. 17.*, or under the statute 42 *Geo. 3. c. 119.*; that in the case of both these statutes an offender could not be proceeded against under the 1st section, taken by itself, but must be proceeded against, if at all, under the 2nd or 3rd sections.

They also contended that the 3rd and 4th counts of the indictment were bad in substance; that the statute 16 & 17 *Vict. c. 119.* did not apply at all to the case; that there was no proof of defendant's house being a betting-house within the meaning of that statute, and that there was no proof of the event or contingency here being such a one as is provided for in that statute.

The Court overruled these objections.

The counsel for the defence then submitted that there was no evidence for the jury in support of the 1st, 2nd or 5th counts. The Court decided that there was.

The counsel for the defendant then addressed the jury, who found the defendant guilty on each count of the indictment, but recommended him to mercy, on the ground that, "perhaps, he did not know that he was acting contrary to law."

The counsel for the defendant submitted that this was a verdict for the defendant. The Court ruled otherwise, but allowed the defendant to go out on bail

until the next *Hilary* Sessions, and now submit the case for the opinion of this Court, as to whether the objections taken by the counsel for the defendant, or any, and which of them, are well founded and ought to prevail.

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Copy of Exhibit A.

The Great Eastern Money Club.

Four Thousand Prints at Sixpence each.

The 23rd Ballot will take place on Monday, July
30th, 1860.

No. 1787.

7.

Copy of Exhibit B.

Ashton-under-Lyne Great Eastern Money Club.

4000 Shares Issued.

The 23rd Ballot published on Monday, the 30th
of July, 1860.

First Prize . . . 33 . . £10.

Second, 2267 . . £5. Third, 1830 . . £2. 10s.

Ten Shillings each.

2402	1367	1777	103	1000	1263	309	1934
631	255	1495	1946	3597	293	3888	126
3286	2784	644	533	180	198	1890	2876
976	2015	1670	1604	347	566	1121	702
1076	524	982	1165	3589	3259	2897	1955
441	3438	2654	2286	318	1764	3604	3630
559	530	1226	90	1729	2907	14	2913
1504	3442	2256	2994	2382	3804	2277	333
1140	185	65	699	1926	9	400	2422
383	1182	3673	777	1618	624	1135	
1416	74	1734	3878	443	3273	370	
2780	574	440	1046	1814	456	1430	
602	2667	1220	470	3470	1403	2671	

Five Shillings each.

1974	2638	1036	3852	678	1960	2008
2889	3008	551	1615	1738	580	3027
1115	130	200	189	785	1270	1129
3695	846	2797	462	159	265	2150
630	163	989	3431	3424	1950	1079
3019	1510	460	1967	649	256	109
1680	139	2660	590	2239	448	2680

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CRAWSHAW'S
Case.Five Shillings each—*continued*.

1538	1150	3305	172	3070	9094	1476	1298
492	300	389	447	1227	3682	1721	340
82	380	980	3130	1677	1635	508	2437
3000	710	2048	311	3844	809	69	1596
2625	5	1243	3792	839	3453	526	2923
1214	3036	1190	344	365	1821	2039	
1661	59	80	3049	609	40	549	

The next Ballot will take place on Monday, August 6th. Tickets may be had at the usual places.

Copy of Exhibit C.

The Great Eastern Weekly Ballot.

4000 Shares or more.

The Meetings take place every Monday Evening.

Shares.

First Prize	.	.	.	£10
Second Do.	.	.	.	£ 5
Third Do.	.	.	.	£ 2. 10s.

The Remainder divided into Shares of 10s. each.

Shares 6d. each may be had here.

Copy of Exhibit D.

White's Race Club for the Radcliffe Cup.

3000 Shares at 1s. each.

To be drawn on Saturday, August 11, 1860.

First Prize	.	.	.	£10
Second Prize	.	.	.	£ 5
Third Prize	.	.	.	£ 2

Starters and Non-Starters £1 each. Remainder in 10s. Prizes.

Tickets, 1s. each.—Sold here.

Copy of Exhibit E.

1860.

CRAWSHAW'S
Case.

White's South Union Weekly Money Club.

2000 Subscribers at 6*d.* each.

First Prize . . . £10

Second Prize . . . £ 5

Third Prize . . . £ 2

Five at £1 each. Twenty-one at 10*s.* each. Sixty
at 5*s.* each.

Distributed every Tuesday Evening at Eight o'Clock.

Tickets 6*d.* each.—Sold here.

Copy of Exhibit F.

North Western Weekly Money Club.

Published every Wednesday Evening at Seven o'Clock.

Tickets Sixpence each.—May be had here.

1908. Copy of one of the Exhibits H.

White's South Union Weekly Money Club.

[No. 48.] 2000 Subscribers at 6*d.* each.

First Prize . . . £10

Second Prize . . . £ 5

Third Prize . . . £ 2

Five at £1 each. Twenty-one at 10*s.* each. Sixty
at 5*s.* each.To be Drawn Tuesday Evening, Aug. 7th, 1860, at
Eight o'Clock.

Copy of one of the Exhibits I.

The Great Eastern Money Club.

Four Thousand Prints at Sixpence each.

The 24th Ballot will take place on Monday, August
6th, 1860.

No. 481.

1.

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CRAWSHAW'S
Case.

This case was argued, on 10th *November*, 1860, before ERLE C. J., CROMPTON J., BRAMWELL B., CHANNELL B. and HILL J.

Dr. *Wheeler*, (*Kay* with him), appeared for the prisoner; no counsel appeared for the Crown.

Dr. *Wheeler*, for the prisoner.—The counts in this indictment are framed upon the Lottery Acts, 10 & 11 *Wm.* 3. c. 17. s. 1., and 42 *Geo.* 3. c. 119. s. 1., and the Act for suppressing betting houses, 16 & 17 *Vict.* c. 119.

First, as to the counts framed upon the statutes as to lotteries, they are bad in law. There is no authority to shew that anterior to the said statute of 10 & 11 *Wm.* 3. c. 17. a lottery was a public nuisance at common law; and upon the construction of that statute there is nothing to shew that the keeping a lottery is indictable. The first section of the statute, after reciting that “several evil disposed persons for divers years last past have set up many mischievous and unlawful games, called lotteries, not only in the cities of *London* and *Westminster*, but in most of the eminent towns and places in *England* and in the dominion of *Wales*, and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, to the utter ruin and impoverishment of many families and to the reproach of the *English* laws and government, by colour of several patents or grants under the Great Seal of *England* for the said lotteries or some of them, which said grants or patents are against the common good, trade, welfare and peace of his Majesty’s kingdom;” for remedy thereof it is enacted, adjudged and declared, that all such lotteries and all other lotteries are common and public nuisances, and that all grants, patents and licences for such lotteries, or any other lotteries, are

void, and against law. Section 2 enacts that, from and after the 29th of *December*, 1699, no person shall exercise, keep open, shew or expose to be played at any such lottery, and that offenders shall be punishable by a heavy penalty. The same statute therefore which by the 1st section creates the offence, by the second provides the punishment, and the penalty therein provided ought to have been enforced instead of proceedings being taken by indictment, a proceeding never contemplated by the Legislature. If the offence was indictable by virtue of the 1st section, it was useless to inflict a penalty by the second. This is the more obvious from the restriction introduced into the 2d section with respect to the time when that section is to have effect. The same argument applies to the counts framed upon 42 *Geo. 3. c. 119*. That statute enacts, by the 1st section, that from and after the passing of that Act lotteries called "Little-goes" shall be deemed, and they are thereby declared to be, common and public nuisances and against law; and the 2d section enacts that from the 1st *July*, 1802, any person keeping offices for such games shall forfeit a heavy penalty and be deemed a rogue and vagabond, and punished accordingly.

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The first section of each statute was intended as a warning to the public of the alteration in the law; the second to provide for the punishment of the offences created for the first time.

CROMPTON J.—How does this point arise? Is this a proceeding in arrest of judgment?

ERLE C. J.—You ask for an arrest of judgment. We will treat this application as a motion in arrest of judgment.

Dr. *Wheeler*.—In *Rex v. William Gregory* (a) an Act of Parliament prohibited the erection or con-

(a) 5 B. & Ad. 555.

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tinuance of any building within ten feet of the road; and it further enacted that if any such building should be erected or continued contrary to the Act it should be deemed a common nuisance. By another clause of the Act two magistrates were empowered to convict the proprietor and occupier of such building and to make an order for the removal thereof; and it was held that, notwithstanding the latter clause, the party who erected or continued a building contrary to the Act might be indicted for a nuisance. In that case *Rex v. Harris* (a), Mr. Serjeant Williams's note to *Rex v. Dickenson* (b), and *Rex v. Wright* (c) were cited; but it never could have been intended by the Legislature that a man should be punished by the infliction of a heavy penalty and then indicted, which might well be if the construction contended for by the Crown is upheld by this Court. The 1st section of 10 & 11 Wm. 3. c. 17. contains a prohibition, and under ordinary circumstances an indictment would no doubt lie for its infringement, yet the remedy being a heavy penalty that is the proper course of proceeding and the course intended by the Legislature. The first section came into operation at an earlier date than the second one; and, therefore, if the first section gave a separate and independent remedy, the result would be that under the first section an offender was liable to an indictment and a severer penalty than he would be under the second section.. These are not cumulative provisions, and the statute which creates the offence also provides the remedy. There would have been no object in the second section if a remedy by indictment had been provided by the first. Supposing an indictment to lie, there was no evidence for the jury on which they were justified in finding the defendant guilty. There ought

(a) 4 T. R. 202.

(b) 1 Saund. 135 b.

(c) 1 Burr. 544.

to be evidence of a lottery or a determination by lot brought home to the defendant. There was no evidence that the place was a place, or the game a game, within the mischief of the statute, or to connect the defendant with the distribution of prizes. An agency should have been proved against the defendant. The distribution may have been by some other manner than by lot. There was no evidence to support the third and fourth counts, which were framed upon the statute 16 & 17 *Vict. c. 119.*, "An Act for the suppression of betting-houses."

There was no evidence of any horse race having taken place, or that this was a betting-house within the meaning of the statute.

Lastly, the verdict ought to stand upon the finding of the jury. Before the statute 10 & 11 *Wm. 3. c. 17.* lotteries were common all over *England*. The reason for postponing the operation of section 2 was probably that, the first section having created the prohibition, it was desirable to grant time, by way of warning to the public, before making the penalty attach. The jury, on returning their verdict, recommended the defendant to mercy, upon the ground that perhaps he did not know he was acting contrary to law.

ERLE C. J.—We are of opinion that the evidence bearing on the charge contained in the counts relating to the horse racing is not sufficient to support those counts. As to the counts relating to the lotteries, the evidence was sufficient. A ticket was purchased at the defendant's house with the expectation of a prize, and the defendant was concerned in delivering the ticket and the prize to the purchaser. The jury were therefore justified in inferring that the defendant kept a lottery, and the objection that there was no evidence to support those counts fails. Then the conviction is

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valid notwithstanding the verdict of the jury. By recommending the defendant to mercy, they did that which it was within their province to do; but the defendant's ignorance of the statute is no excuse for him. The great point made in the powerful argument of Dr. *Wheeler* was in arrest of judgment. The defendant was indicted for a misdemeanor under the statute of *Wm. 3.*, which by the first section declares that lotteries are public nuisances; and by the second enacts that after the day therein named any person keeping open a lottery shall be subject to a penalty. The third section, in a similar way, provides that persons playing at such lotteries shall be subject to a penalty. The second and third sections came into operation at a different time to the first, which, whatever may be its effect, came into operation upon the passing of the statute, and it was therefore argued that the proper remedy was under the second section. But we find that the principle has prevailed and been acted on without qualification, that when the Legislature declares an act to be a public nuisance the person doing the act is indictable, *Rex v. Gregory (a)*; and we take that principle to be an answer to Dr. *Wheeler's* argument. We therefore hold that the counts framed upon the Lottery Act are not bad, and that the declaration in the statute rendered the defendant indictable.

Conviction affirmed.

(a) 5 B. & Ad. 555.

AN

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PRINCIPAL MATTERS.

ABDUCTION OF A GIRL UNDER SIXTEEN YEARS OF AGE.

The defendant was convicted on an indictment, framed upon 9 *Geo.* 4. c. 31. s. 20., for taking an unmarried girl under sixteen out of the possession of her father, and against his will. It was proved that the prisoner, (who had previously stayed out with the girl for a night), having met her by arrangement, stayed with her away from her father's house for three days, sleeping with her at night; that he took her away without her father's consent and against his will, in order to gratify his passions and then allow her to return home; but not with a view of keeping her away from her home permanently. *Held*, that the evidence justified the conviction. *Regina v. Timmins*, 276

ACCESSORY.

See PRINCIPAL (2).

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False pretence by innocent agent, see *Regina v. Butcher*, 6

AMENDMENT.

1. The Court will not send a case back for amendment on the mere application of counsel; but will do so if, on the argument, it appears that it is imperfectly stated. *Regina v. Hilton*, 20
2. An indictment for perjury alleged that the prisoner, an insolvent debtor, after the passing and coming into operation of certain statutes, to wit on the 30th of May, 1859, presented his petition. The time when two of the sta-

tutes were passed was inaccurately described, and the Judge at the trial amended the indictment by striking out the words stating such time. *Held*, that it was competent to the Judge to make such amendment. *Regina v. Westley*, 193

ARSON.

It is a felony, under 14 & 15 *Vict. c. 19. s. 8.*, coupled with 7 *Wm. 4 & 1 Vict. c. 89. s. 3.*, for a man to set fire to his own goods in his own house with intent, by burning the goods, to defraud an insurance Company. Where, therefore, an indictment charged that *A. L.* "feloniously, &c., set fire to certain goods and chattels of him the said *A. L.*, to wit, &c., then being in a certain building, to wit a certain house situate, &c., and then in the possession and occupation of the said *A. L.*, with intent in so doing to defraud the said insurance Company known by the name of, &c., it was held sufficient. *Regina v. Lyons*, 38

ASSAULT.

1. Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm, against the statute, &c., a prisoner may be convicted of a common assault. *Reg. v. Oliver*, 287
2. The indictment in one set of counts charged the defendant with an assault upon the prosecutor, and having thereby unlawfully and maliciously inflicted grievous bodily harm upon him. There was also a count for a common assault.

After evidence of grievous in-

juries, the Recorder told the jury that there was evidence of grievous bodily harm, and that the question of whether the defendant *intended* to inflict grievous bodily harm did not arise.

The jury found a verdict of "Guilty of an aggravated assault, without premeditation; it was done under the influence of passion."

Hereupon the Recorder directed a verdict of guilty to be entered upon the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm.

Held, that the Recorder rightly directed the verdict to be so entered. *Reg. v. Sparrow*, 298

BANK-NOTE.

See FALSE PRETENCES (3).

BANKRUPT.

A bankrupt was convicted on an indictment framed upon sect. 252 of the 12 & 13 *Vict. c. 106*, (the Bankrupt Law Consolidation Act, 1849), for making a false and fraudulent entry in a book of account, with intent to defraud his creditors.

The jury found that the entry in question was made by the bankrupt with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him.

Held, that the conviction was wrong, as the bankrupt was not found to have had any intent to defraud his creditors within the meaning of the statute. *Reg. v. Ingham*, 181

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CONSPIRACY.

The three prisoners being in a public-house with the prosecutor, one of them, in concert with the other two, placed a pen-case on the table, and left the room. Whilst he was absent, one of the two remaining took the pen out of the case, and put a pin in its place, and the two prisoners induced the prosecutor to bet with the other prisoner when he returned into the room that there was no pen in the case, and the prosecutor staked fifty shillings. On the pencil-case being turned up, another pen fell into the

prosecutor's hand, and the prisoners took the money.

Held, that the evidence supported a conviction upon a count charging the three prisoners with conspiring, by divers false pretences and fraudulent devices, to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the prisoners if he could.

Seemle, that the facts did not amount to the offence of cheating at play, within *s.* 17 of 8 & 9 *Vict. c.* 109. *Reg. v. Hudson*, 263

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COUNTY COURT.

The prisoner was convicted on an indictment, under section 57 of 9 & 10 *Vict. c.* 95., for acting and professing to act under a false colour and pretence of the process of the County Court of *S.* It appeared that the prisoner, being a creditor of *B.*, obtained a blank form for plaintiff's instructions for summons, and filled it up with particulars of the names and addresses of himself and *B.* as plaintiff and defendant, and of the nature and amount of the claim. He, without authority, signed the form with the name of the Registrar of the Court, and indorsed a notice, (which he also without authority signed with such name), that unless *B.* paid the amount by a certain day an execution warrant would issue. This form so filled up and signed he sent by post to *B.* with intent thereby to obtain payment of his debt.

Held, (*BRAMWELL B.* dubitante), that these facts constituted an acting and professing to act under the false colour or pretence of the process of the County Court, and that the conviction

was right. *Regina v. Richmond*, 142

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Dogs, not being the subject of larceny, are not "chattels" within the meaning of 7 & 8 *Geo. 4. c.* 29. *s.* 53. *Regina v. Robinson*, 34

DYING DECLARATION.

Dying declarations are only admissible in evidence, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. Therefore, on an indictment for feloniously using certain instruments upon the person of a woman with intent to procure a miscarriage, the dying declaration of the woman was held inadmissible. *Regina v. Hind*, 253

EMBEZZLEMENT.

1. The defendants were indicted for having fraudulently transferred for their own benefit a bill of lading intrusted to them as brokers.

The indictment was framed on section 6 of 5 & 6 *Vict. c.* 39., which contains a proviso that no agent shall be liable to be convicted by any evidence in respect of any act done by him, if he shall, at any time previous to his being indicted for such offence, have disclosed the same in any examination before any Commissioner of bankruptcy.

The defendants were charged with the offence in question before a magistrate and committed

for trial, the depositions which were then taken containing ample evidence to support the charge.

The defendants had previously been adjudged bankrupts; and subsequently to their committal as aforesaid, but before indictment, they were taken by their creditors before a Commissioner in bankruptcy, and then made a statement which was substantially an admission of the same facts as were stated by the witnesses in the depositions.

On the trial, the examinations of the defendants in bankruptcy were offered by them as a defence, it being contended that, having disclosed the act before a Commissioner previous to indictment, they were protected by the proviso, and were not liable to be convicted.

Held, that the evidence of a disclosure was admissible under the plea of not guilty.

Held, by the majority of the Court, (LORD CAMPBELL C. J., POLLOCK C. B., WIGHTMAN J., MARTIN B., WILLES J., BRAMWELL B., WATSON B., CHANNELL B. and HILL J.), that, as the prisoners only stated before the Commissioner that which had been previously known and previously proved by evidence before the magistrate, they had not made a disclosure within the meaning of the proviso, and consequently were not entitled to its protection.

Held, by the minority of the Court, (COCKBURN C. J., WILLIAMS J., CROMPTON J., CROWDER J. and BYLES J.), that, as the statement was made before indictment on a compulsory examination before a Commissioner in bankruptcy instituted *bonâ fide* by the creditors, it was a disclosure within the meaning of the proviso, to the protection of

which the defendants were therefore entitled. *Regina v. Sheen*, 97

2. The prisoner was convicted upon an indictment for embezzlement. It was the duty of the prisoner, who was the assistant overseer of a township, to collect the rates; and the course was upon receipt to pay them into a bank to the account of the overseers, and then to obtain the overseers' receipts for the sums so paid. It was his duty also to enter the rates, when received, in a book, and at the audit he charged himself by the entries in his book, and discharged himself by the receipts of the overseers.

Having misappropriated certain monies which he duly entered in his book when received, he fraudulently obtained from the overseers receipts for the several sums stated in the indictment by falsely telling them that he had paid the money into the bank. These receipts he produced to the auditor, and so deceived him as to his having handed over the monies.

Held, that the prisoner was rightly convicted, and that the fact of his entering the sums, when received, in his book, did not alter the character of his offence. *Regina v. Guelder*, 284

3. The defendant, who was convicted of embezzlement, was secretary of a money club. His duties were cognate to that of receiving money, although the receipt of money was not expressly named as one of them in the rules, which were in writing. The defendant was directed by the club to sue upon a joint promissory note their property or get better security, and the note was handed to him by the treasurer, not a member of the club, who desired that his name should not be used in legal

proceedings. The note was payable to the treasurer's order, and the defendant indorsed the treasurer's name on the note, and employed an attorney, who issued a writ at the suit of the defendant. In consequence of the action money was paid to the defendant by one of the makers of the note, the receipt of which the defendant denied, and fraudulently withheld the money from the club, and appropriated it.

Held, (CROMPTON J. dubitante), that the defendant was rightly convicted. *Regina v. Tongue*, 289

See LARCENY (3).

EVIDENCE.

The evidence of a disclosure, under 5 & 6 Vict. c. 39., is admissible under the plea of not guilty. *Regina v. Skeen*, 97

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FACTORS.

See EMBEZZLEMENT (1).

FALSE IMPRISONMENT.

The defendant was convicted on an indictment charging him with assaulting the prosecutors on the high seas, and falsely imprisoning and detaining them. The prosecutors were *Chilian* subjects, and had been ordered by the government of *Chili* to be banished from that country to *England*.

The defendant, being the master of an *English* merchant vessel lying in the territorial waters of *Chili* near *Valparaiso*, contracted with the *Chilian* government to take the prosecutors from *Valparaiso* to *Liverpool*; and they were

accordingly brought on board the defendant's vessel by the officers of the government, and were carried by the defendant to *Liverpool* under his contract.

Held, that, although the conviction could not be supported for the assault and imprisonment in the *Chilian* waters, it must be sustained for that which was done out of the *Chilian* territory; and that, although the defendant was justified in receiving the prosecutors on board his vessel in *Chili*, yet that justification ceased when he passed the line of *Chilian* jurisdiction; and the detention of the prisoners and conveying them to *Liverpool* was a wrong intentionally planned and executed in pursuance of the contract, amounting to a false imprisonment and triable by *English* law. *Regina v. Lesley*, 220

FALSE PRETENCES.

1. The defendant was convicted of obtaining money by false pretences. The first count of the indictment alleged that the defendant pretended to *T. H.* that he (the defendant) was the agent of *J. B.*, and was sent to the payable of a certain company, to receive certain monies then payable by the company to the said *J. B.*, and that he was authorized to receive such monies for and on behalf of the said *J. B.*, by means of which said false pretences the defendant obtained from *T. H.* certain monies of the said company.

The second count alleged that the defendant pretended to *A.* that he (the defendant) was authorized to send him, (the said *A.*), to the said payable, to get the payable money of the said *J. B.*, by means of which said false pretence the defendant obtained from

the said *T. H.*, and from the said *A.*, certain monies of the monies of the said company.

The fourth count alleged that the defendant pretended to the said *A.* that he (the defendant) was the agent of *J. B.*, and that he (the defendant) was sent by the said *J. B.* to the said pay-table to receive certain monies then payable by the said company to the said *J. B.*, and that he (the defendant) was authorized to receive such monies for and on behalf of the said *J. B.*, by means of which said false pretences the defendant obtained from *A.* certain monies of the monies of *A.*

On the trial it was proved that the defendant promised *A.* a penny to go to the pay-table and fetch *J. B.*'s money; that *A.* accordingly went to the pay-table where the said *T. H.* was, and asked for, and received from *T. H.*, *J. B.*'s payable money, which he afterwards gave to the defendant, because he had promised him a penny; and it was also proved that *T. H.* would not have parted with the money if *A.* had not said he was sent for it, and if he had not believed that *A.* was authorized by *J. B.* to receive it.

Held:—1. That, *A.* being the innocent agent of the defendant, this amounted to a false pretence by the defendant himself, that *A.* was authorized to receive *J. B.*'s payable money; but

2. That the conviction could not be sustained, because there was no count in the indictment charging that as the false pretence on which the money was obtained.
Reg. v. Butcher, 6

2. Dogs, not being the subject of larceny, are not "chattels" within the meaning of 7 & 8

Geo. 4. c. 29. s. 53. Reg. v. Robinson, 34

3. The prisoner was convicted upon an indictment for obtaining money by false pretences, the false pretence alleged being, that a certain piece of paper was a bank note then current, good and of the value of 5*l.*; whereas it was not a bank-note then current or good or of the value of 5*l.*, or of any value whatever.

It was proved that the note was the note of a private bank which was no longer in existence, and which had paid a dividend of 2*s.* 4*d.* in the pound; and that a neighbouring banker refused to change it.

The chairman told the jury that there was some evidence from which they might infer that the note was not of any value.

Held, that a person passing such a note as a good note, and as of the value of 5*l.*, knowing that the bank was insolvent, and had stopped payment, and could not pay the note in full, would be guilty of obtaining money by false pretences: but that as the chairman had told the jury that there was evidence from which they might infer that the note was of no value, and as there was in fact no evidence from which it could be so inferred, the conviction must be quashed. *Reg. v. Evans,* 187

4. The prisoner was convicted upon an indictment for obtaining money by false pretences.

It appeared that the prosecutor bought of the prisoner, and paid him for, eight cheeses, upon a false representation by him that certain "tasters" which he produced had been extracted from, and were part of, the cheeses which he offered for sale, whereas they had not been so extracted, but

were in fact part of another and better cheese.

Held, that the false representation made by the prisoner was an indictable false pretence, and that the conviction was right. *Reg. v. Goss*, 208

5. The prisoner was convicted on an indictment for obtaining money by false pretences. It appeared that the prosecutor bought of the prisoner, and paid him for, a quantity of coal upon a false representation by him that there were 14 cwt., whereas in fact there were only 8 cwt., but so packed in the cart in which they were as to have the appearance of a larger quantity.

Held, that the false representation as to the quantity of the coal was an indictable false pretence, and that the conviction was right. *Reg. v. Ragg*, 214

6. The prisoner was charged with obtaining moneys from *H.* by false pretences. He was employed by his master to take orders for goods, but was not authorized to receive the money. Eleven days after he was so employed, he obtained the money mentioned in the indictment from *H.*, by falsely representing that he was authorized by his employer to receive it. For the purpose of proving the intent of the prisoner, evidence was admitted of his having, on a day not specified but within a week from the time when the moneys were obtained from *H.*, obtained another sum of money from another person by a similar false pretence, such obtaining not being charged in the indictment.

Held, that the evidence was not admissible. *Reg. v. Holt*, 280

7. The indictment charged that the

prisoner obtained twenty yards of carpet, by falsely pretending that a certain person, who lived in a large house down the street, and had had a daughter married sometime back, had been at him about some carpet, and had asked him to procure a piece of carpet; whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of carpet.

The evidence was, that the prisoner obtained twenty yards of carpet by stating to the prosecutor, who was a shopkeeper in the village of *S.*, that he wanted some carpeting for a family living in a large house in the village, who had had a daughter lately married; that the prisoner afterwards sold the carpeting so obtained to two different persons; and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent the prisoner to the prosecutor's shop for the carpet.

Held, that there was a sufficient false pretence alleged and proved, and that it was sufficiently negatived by the evidence. *Reg. v. Burnside*, 282

See INDICTMENT.

FIXTURES.

See LARCENY (2).

FRIENDLY SOCIETY.

See LARCENY (8).

HIGH SEAS.

See FALSE IMPRISONMENT.

HIGHWAY.

Upon an indictment for the non-repair of a public carriage road, it appeared that the road was an ancient highway; that eighteen years ago the indicted parish, wherein the road was situate, was inclosed under 6 & 7 *Wm.* 4. c. 115., which incorporates the General Inclosure Act, 41 *Geo.* 3. c. 109.; and the road was described in the award. Before the award the Commissioners made an alteration in the original road by straightening and widening it, but the whole of the original road was comprehended in the existing road as set out in the award. Both before and since the award the parish had repaired it, but no steps had been taken by the Commissioners for putting the road into complete repair; there never was any declaration by justices that it had been fully completed and repaired, and no proceedings had been taken under 5 & 6 *Wm.* 4. c. 50. s. 23. It passed through allotable land on both sides, except that a small portion on one side was an old inclosure.

Held, that the parish was not liable to repair the road. *Regina v. East Hagbourne*, 135

HUSBAND AND WIFE.

The prisoner was charged in the first count of an indictment with obtaining money from the trustees of a savings bank, by falsely pretending that a document presented to the bank by the wife of *D.* had been filled up by the authority of *D.*; and in the third count of the same indictment, the prisoner was charged with conspiring with the said wife of *D.* to cheat the bank. The evidence of *D.* was received, in proof of the first count, to shew that he had given no authority to

fill up the document or to withdraw the deposit.

Held, that the evidence of *D.* was properly received in proof of the first count, his wife not being indicted, although she was alleged to be one of the parties to the conspiracy charged in the third count. *Regina v. Halliday*, 257

See LARCENY (5), (6).

RECEIVING (4).

IGNORANCE OF LAW.

The defendant was indicted, under 10 & 11 *Wm.* 3. c. 17., and 42 *Geo.* 3. c. 119., for keeping a lottery. The jury returned a verdict of guilty, but recommended him to mercy on the ground that perhaps he did not know that he was acting contrary to law.

Held, that the conviction was not invalidated by the addition to the verdict. *Regina v. Crawshaw*, 303

INDICTMENT.

The prisoner was charged, in the first count of an indictment, with obtaining money from the trustees of a savings bank, by falsely pretending that a document presented to the bank by the wife of *D.* had been filled up by the authority of *D.*; and, in the third count of the indictment, the prisoner was charged with conspiring with the said wife of *D.* to cheat the bank.

The jury found the prisoner guilty on the first count, and not guilty on the third count.

Held, that finding the prisoner guilty on the first count was consistent with finding him not guilty on the third count. *Regina v. Halliday*, 257

See ARSON.

FALSE PRETENCES (1).

LARCENY (2), (4), (7).

LOTTERY.

PEEJURY (2), (4).

RECEIVING (2).

INTENT.

1. To defraud by bankrupt by making false entries in book of account, 181
2. To inflict grievous bodily harm, 298

JURISDICTION.

Three prisoners were indicted for feloniously cutting and wounding *E.R.* with intent to do him grievous bodily harm. The venue of the indictment was *Glamorganshire*, and it appeared that the offence was committed on board an *American* ship in the *Penarth Roads* in the *Bristol Channel*, three-quarters of a mile from the coast of *Glamorganshire*, at a spot never left dry by the tide, but within a quarter of a mile from the land which is left dry by the tide.

The place in question was between *Glamorganshire* and the *Flat Holms*, an island treated as part of the county of *Glamorgan*, the ship being at the time two miles from the island on the inside. It was about ten miles from the opposite shore of *Somersetshire*, and ninety miles from the roads to the mouth of the *Channel*.

Held, that the part of the sea where the vessel was at the time when the offence was committed was within the body of the county of *Glamorgan*. *Regina v. Cunningham*, 72

See PERJURY (1), (3), (4).

LARCENY.

1. Where a person finds lost property and appropriates it to his own use, it is necessary, in order to convict him of larceny, that the jury should find that at the time he took possession of the property he knew or had the means of knowing who the owner was, and took

possession of it with the felonious intent to appropriate it to his own use. Therefore where on a trial for larceny, under such circumstances, the Chairman told the jury that a felonious intent was a necessary ingredient in every larceny, but that such intention was to be judged of by acts subsequent as well as immediate, and that if they thought the conversion of the property by the prisoner to his own use without inquiry was proved, and that though there was no name or mark upon it, there was such peculiarity about it as to warrant inquiry, and above all if they were satisfied that the prisoner subsequently heard that the property was lost and cried by the public crier, and then did not take measures to make restitution, they might infer felonious intention; it was held that such direction was defective, inasmuch as it was consistent therewith that the jury should find the prisoner guilty, although they were of opinion that the felonious intent did not exist at the time of finding. *Regina v. Christopher*, 27

2. A count in an indictment framed upon section 44 of 7 & 8 *Geo. 4. c. 29.*, charged the prisoners with stealing lead "then being fixed to a certain wharf," not alleging that the wharf was a "building." It was proved that the lead formed the gutters of two sheds on the prosecutor's wharf, which sheds were constructed of brick, timber and tiles.

Held, that it was sufficiently alleged and proved that the prisoners had stolen lead "fixed to a building." *Regina v. Rice*, 87

3. The prisoner was a miller's foreman. It was his duty to sell flour to customers, to enter the sales in a double check book, to

give the customers a copy of the entry, and retain the counterfoil for his master's inspection, and to enter in a cash book his receipts and payments immediately upon their being made. Once a week there was a settlement of these books and accounts with his master.

Upon a sale of some flour he received the money from the buyer, and gave her a receipt with a check taken from a book belonging to his master, but not from the regular book; and having fraudulently omitted to make any entry of the transaction, appropriated the money which he so received.

Held, that the prisoner could not be convicted of a larceny of the flour. *Regina v. Betts*, 90

4. The prisoner was convicted of stealing iron, the property of the proprietors of the *G. C. N.* Company. It appeared that while the canal was in process of being cleaned, the prisoner, (not being in the employ of the Company, but a stranger), took away from the bed of the canal the iron in question. It also appeared that iron found by the Company during such cleansing would, if the owner could be found, be returned to him, but otherwise would be kept by the Company.

Held, that the Company had sufficient property in and possession of the iron to maintain an indictment for larceny, and that the conviction was right. *Regina v. Rowe*, 93

5. The prisoner was convicted of stealing articles of furniture the property of *R. E.*, of the value of 5*l.* and more, in his dwelling house at *Manchester*. It appeared that the prisoner was a lodger in the house of the prosecutor at *Manchester*; that the prisoner

procured a horse and cart, and he and the prosecutor's wife put the articles in question in the cart, and had them conveyed to the railway station, from whence the prisoner, the prosecutor's wife and her three children left by train for *Leeds*.

A fortnight afterwards the prisoner and the prosecutor's wife were found living together in *Leeds* in a house which she had taken in her own name, and in the house were all the articles so taken from the prosecutor's house in *Manchester*. On the trial the prosecutor's wife was called as a witness on behalf of the prisoner, and swore that they had not gone away for the purpose of carrying on an adulterous intercourse, and had never committed adultery together. The Judge directed the jury, that if they were satisfied that, when the prisoner and the prosecutor's wife so took the property, they went away together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but that, if they believed the evidence of the wife, the prisoner was entitled to an acquittal.

Held, that the direction was right. *Regina v. Berry*, 95

6. *A.* and *B.* took the goods of a husband without his consent, and with the intent to deprive him absolutely of his property in them; but the taking was in the presence and with the consent and privity of the wife.

A. and *B.* were uncle and cousin of the wife, who at the time of the taking intended to leave, and afterwards left, her husband's house without the intention of returning, and went with one of the prisoners to the house of the

other; but there was no evidence that she had committed, or intended to commit, adultery with either of them.

It was not left to the jury to say which was the principal in taking the goods, the wife, or *A.* and *B.*, or either of them.

Held, that it must be considered that the wife took the goods, and *A.* and *B.* assisted, and that they were not guilty of larceny. *Regina v. Avery*, 150

7. A pawnbroker's duplicate is the subject of larceny. It is "a warrant for the delivery of goods" within the meaning of section 5 of 7 & 8 *Geo.* 4. *c.* 29.; and is well described in an indictment, either as "a warrant for the delivery of goods," "a pawnbroker's ticket," or as "a piece of paper." *Regina v. Morrison*, 158

8. The prisoner, who was a trustee of a Friendly Society, was appointed by a resolution of the society to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but, instead of taking it to the bank, he applied to his own use. He was indicted for stealing as bailee of the money of the treasurer, and also for a common law larceny, the money being laid as that of the treasurer.

The Friendly Societies Act, 18 & 19 *Vict.* *c.* 63. *s.* 18, vests the property of such societies in the trustees, and directs that in all indictments the property shall be laid in their names. *Held*, that the prisoner could not under these counts be convicted either as a bailee or of a common law larceny. *Reg. v. Loose*, 259

LOTTERY.

By the first section of 10 & 11 *Wm.* 3. *c.* 17, lotteries are declared to be common and public nuisances. The second section, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty, to be sued for by information or action. Statute 42 *Geo.* 3. *c.* 119. contains similar enactments with regard to lotteries called "Little-goes."

Held, on motion in arrest of judgment, on an indictment for keeping a lottery, containing counts framed upon the above-mentioned statutes, that the counts were good and the offence indictable.

The defendant kept an eating-house, and sold tickets for what was called the "*The Great Eastern Money Club*," in respect of which prizes were drawn, and the holders of the tickets, whose numbers were drawn for prizes, received the same; and the defendant delivered out the prizes to such ticket-holders.

Held, that this evidence was sufficient to support a conviction against the defendant for keeping a lottery, but not sufficient to support a conviction for keeping a room for betting upon horse-racing under the 16 & 17 *Vict.* *c.* 119.

The jury returned a verdict of guilty, but recommended the defendant to mercy on the ground that perhaps he did not know that he was acting contrary to law.

Held, that the conviction was not invalidated by the addition to the verdict. *Reg. v. Crawshaw*, 303

MANCHESTER IMPROVEMENT ACT.

The defendant was indicted for erecting a house within 24 feet of another existing house, contrary to the provisions of the *Manchester Improvement Act*.

By section 30 of that Act it is enacted, that it shall not be lawful to build any houses with their fronts facing each other, which shall be separated from each other by a space less than 24 feet wide, excepting only on sites of houses built prior to the act, and except on vacant plots in streets partially built upon on both sides.

It appeared that *A.*, the owner of land, built up to the boundary of his land, the same not being in a street; and some time afterwards the defendant, the owner of the land in front of the houses built by *A.*, built a stable, within 24 feet, in front of *A.*'s houses.

Held, that the defendant was not prevented from doing so by the provisions of section 30, as that section applies only to the erection of new streets. *Reg. v. Sidebotham*, 171

MANSLAUGHTER.

The defendant was convicted of manslaughter. It appeared that the defendant was a person who made fireworks contrary to stat. 9 & 10 *Wm. 3. c. 7*.

He kept a quantity of combustibles at his house for the purpose of his business as a maker of fireworks; and during his absence, through the negligence of his servants, a fire broke out amongst such combustibles, and a rocket becoming thereby ignited flew across the street, and setting fire

to a house opposite caused the death of a person therein.

Held, that the conviction was wrong, as the death was not occasioned by the unlawful act of the defendant, but by the negligence of his servants. *Reg. v. Bennett*, 1

MASTER AND SERVANT.

See EMBEZZLEMENT (3).

MANSLAUGHTER.

NAVAL STORES.

The prisoner was convicted on an indictment, under 9 & 10 *Wm. 3. c. 41. s. 2.*, charging him with having illegally had in his custody, possession and keeping, naval stores marked with the broad arrow. It appeared by the evidence that bags marked *M*, with their contents, addressed to *G.*, an officer of *The London and South Western Railway Company* at *Nine Elms*, were taken by two females to the *Portsmouth* Station and duly forwarded to *London* by railway, and deposited in the goods department of the railway at *Nine Elms, London*, where *G.* acted as officer. The prisoner, a marine store dealer at *Portsmouth*, wrote and telegraphed to an officer of the railway Company to deliver the bags to Mr. *Emmanuel*. This was not done, but a letter written by *G.*, stating "there are several bags lying at this station, consigned by you to me, marked *M*, to whom are they to be delivered?" was shewn to the prisoner by a clerk in the railway office, and the prisoner, in reply, directed the clerk to telegraph to "deliver to *Emmanuel* as before." The bags, in consequence of information, were opened at the goods depart-

ment, and were found to contain naval stores marked with the broad arrow. Bags had been previously forwarded in a similar manner by the railway to the goods department of the Company in *London*, marked E, which the prisoner had ordered to be delivered to *Emmanuel*. *Held*, that there was evidence to support the conviction. *Regina v. Sunley*, 145

PAWNBROKERS.

A pawnbroker's duplicate is the subject of larceny. *Regina v. Morrison*, 158

See LARCENY (7).

PERJURY.

1. A summons was issued by a justice of the peace, under 7 & 8 *Vict. c. 101.*, and 8 *Vict. c. 10.*, on the application of the mother of a bastard child against the putative father, more than twelve months after the birth of such child. The summons stated that the mother alleged that the defendant had paid money for the maintenance of the child within twelve months after its birth, but did not state that she had "upon proof" applied; and it appeared in fact that no such proof had been given except the statement of the mother (not upon oath) to the justice. The putative father appeared at the Petty Sessions, according to the exigency of the summons, and made no objection to the proceedings; and the case, on the hearing at such Petty Sessions, was gone into upon the merits, when he swore that he had not paid any money for the maintenance of the child. He was thereupon indicted for perjury and convicted.

Held, by Lord CAMPBELL C.J., MARTIN B., CROWDER J., WILLES

J. and WATSON B.: 1. That a proceeding under the above statutes against the putative father of a bastard child is not a proceeding in *pœnam*, but is in the nature of a *civil* suit. 2. That evidence of the payment of money by the putative father within the twelve months was material on the hearing of the summons.

Held, by Lord CAMPBELL C.J., CROWDER J., WILLES J. and WATSON B., (MARTIN B. *dissentiente*), that, assuming that there ought to have been evidence on oath of the payment of money by the putative father within the twelve months before the issuing of the summons, the defendant had submitted to the jurisdiction of the Petty Sessions, and waived and cured the want of such evidence, which was a mere irregularity in procedure.

Held, by MARTIN B., that the jurisdiction of the justice to issue the summons was a special jurisdiction; that to create it there must be *proof on oath* as a condition precedent, and that no subsequent appearance could cure the want of such proof; the distinction being between a Court of general jurisdiction and a special one, and not between proceedings of a civil and criminal nature. *Regina v. Berry*, 46

2. The prisoner was convicted of perjury. The indictment charged that a cause was pending in the County Court of C. in which A. was plaintiff and B. defendant; that, on the hearing of such cause, it "became a material question whether the said A. had, in the presence of the prisoner, signed at the foot of a certain bill of account between A. and B. a receipt for payment of the amount of the said bill;" and that the prisoner did falsely and knowingly swear "that the said A. did on a

certain day, in the presence of the prisoner, sign the said receipt, (meaning a receipt at the foot of the said firstly hereinbefore mentioned bill of account, for the payment of the amount of the said bill)." It was proved that *A.* had signed several similar receipts to similar bills in the presence of the prisoner.

Held, that the indictment was sufficiently certain and the conviction right. *Regina v. Webster*, 154

3. A summons was issued by a justice of the peace, under 7 & 8 *Vict. c. 101.* and 8 & 9 *Vict. c. 10.*, on the application of the mother of a bastard child against the putative father, more than twelve months after the birth of such child.

The summons was in the form pointed out in the schedule to 8 & 9 *Vict. c. 10.*, alleging that the mother had given proof of payment of money for maintenance of the child within twelve months after its birth: but no such proof had in fact been given to the summoning justice.

The defendant appeared at the Petty Sessions, according to the exigency of the summons, and made no objection to the proceedings; and the case on the hearing at such Petty Sessions was gone into upon its merits.

The defendant was convicted on an indictment charging him with perjury committed at such Petty Sessions, the jury finding that he had not within twelve months after the birth of the child paid any money for its maintenance.

Held, that the justices in Petty Sessions had jurisdiction, and that the conviction was right. *Regina v. Simmons*, 168

4. The defendant, who had petitioned the Court for the relief of

insolvent debtors as a trader owing less than 300*l.*, was convicted on an indictment for perjury committed by him before that Court at an adjourned hearing of the matters of his petition.

The preliminary averments in the indictment were, that the defendant was a trader owing less than 300*l.*, and having resided as by law required within the district; and in proof thereof the prosecutor produced the petition of the defendant, signed by him and filed in the Court for the relief of insolvent debtors, wherein he alleged, as facts upon which with others he founded his application to that Court, the same matters as were set forth in such averments.

Held, that the preliminary averments were sufficiently proved.

The indictment also alleged that notice of the petition was inserted in the *Gazette*; that a day was appointed for the first examination; and that the sitting on that day was adjourned. No evidence was given in support of these allegations; and it was objected that as they were not proved it did not appear that the Court had any jurisdiction to hold the examination.

Held, that, as, upon the filing of the petition, the Court had jurisdiction to institute the examination, and as the sittings of a Court of record are presumed to be lawfully and rightfully holden, these allegations might be rejected as immaterial.

The indictment also alleged that the prisoner after the passing and coming into operation of certain statutes, to wit on the 20th of *May*, 1859, presented his petition. The time when two of the statutes were passed was inaccurately described, and although the indictment purported to set out the titles of the statutes *verbatim*,

it inaccurately described the title of one of them.

With regard to the time when the acts were passed, the Judge at the trial amended the indictment by striking out the words stating such time.

Held; 1. That it was competent to the Judge to make such amendment as above stated. 2. That with regard to the misdescription of the title of the statute, which was not amended at the trial, as the reference was made to the statute only to indicate that the petition was presented after the passing of such statute, and as it was also alleged in the indictment that the petition was presented on the 20th May, 1859, being a day after such passing of which the Court was bound to take notice, the description of the title of the statute might be altogether rejected.

Seemle, that when the title of a statute is not correctly set out in an indictment, but is so described as to enable the Court to know with certainty what statute is referred to, no objection to the indictment on account of the variance could now be sustained. *Regina v. Westley*, 193

POSSESSION.

See LARCENY (4).

NAVAL STORES.

PREVIOUS CONVICTION.

It is no objection to an indictment for felony that a previous conviction is stated at the beginning, and not, as is more usual, at the end of the indictment; and the proper course, when an indictment is so framed, is to state the new charge to the jury in the first instance,

and then, if they return a verdict of guilty, to charge them to inquire as to the fact of the previous conviction. *Regina v. Hilton*, 20

PRINCIPAL.

1. When a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. *Regina v. Hilton*, 20

2. The first two counts of an indictment charged *A.* and *B.* jointly with stealing, and the third charged *B.* alone with receiving the stolen goods. *A.* was acquitted, no evidence having been offered against him, in order that he might be a witness against the other prisoner. Upon his and other evidence, which proved that *B.* was an accessory before the fact to the stealing and afterwards received the stolen goods, the jury found a general verdict of guilty against *B.*, which verdict was entered upon all the counts.

Held, that *B.* was not entitled to an acquittal upon the first two counts by reason of the principal, *A.*, having been acquitted, because 11 & 12 *Vict. c. 46. s. 1.* has made the being an accessory before the fact a substantive felony, and the conviction of the principal is not now a condition precedent to the conviction of an accessory.

Held, also, that there was no inconsistency in the general verdict, as an accessory before the fact may also be a receiver. *Regina v. Hughes*, 242

PROPERTY OF FELON.

- A Judge has no power, either at common law or by statute, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor. *Regina v. Pierce*, 235

RAILWAY.

- A railway truck was placed by the defendants across a line of railway, so as to obstruct the passage of any carriage, and to endanger the safety of any passengers conveyed therein; but its position was discovered, and the truck removed, before any collision took place.

The line of railway was constructed under the powers of an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by the power of steam; but, at the time of the alleged offence, the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and workmen.

Held, that the so placing the truck across the line was an offence within section 15 of 3 & 4 *Vict. c. 97.*, although the line was not opened, and no actual obstruction took place. *Regina v. Bradford*, 268

RAPE.

The prisoner was indicted for a rape upon a girl of weak intellect, incapable of distinguishing right from wrong, and who was not shewn to have offered any resistance. The Judge told the jury, that, if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and *against her will*, they

ought to convict; and also that, if they should be of opinion that the girl was incapable of giving consent or of exercising any judgment upon the matter, then, if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and *without her consent*, they ought to find him guilty.

The jury found the prisoner guilty, and stated that they considered that the girl was incapable of giving consent from defect of understanding.

Held, that the conviction was right. *Regina v. Fletcher*, 63

RECEIVING.

1. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. *Regina v. Hilton*, 20
2. The first count of the indictment charged the prisoner with stealing certain goods and chattels; and the second count charged him with receiving "the goods and chattels aforesaid of the value aforesaid so as aforesaid feloniously stolen." After objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury, and the prisoner was acquitted upon the first count, and convicted upon the second.
Held, that the conviction was good. *Regina v. Huntley*, 238
3. The first two counts of an indictment charged *A.* and *B.* with jointly stealing, and the third charged *B.* alone with receiving

the stolen goods. *A.* was acquitted, no evidence having been offered against him, in order that he might be a witness against the other prisoner. Upon his and other evidence, which proved that *B.* was an accessory before the fact to the stealing and afterwards received the stolen goods, the jury found a general verdict of guilty against *B.*, which verdict was entered upon all the counts.

Held, that there was no inconsistency in the general verdict, as an accessory before the fact may also be a receiver. *Reg. v. Hughes*, 242

4. The prisoner and her husband and *P.* were indicted jointly for burglary and receiving. The jury found *P.* guilty of housebreaking, and the prisoner and her husband guilty of receiving.

Part of the stolen property was found in the house where the prisoner and her husband lived together, and the prisoner in the absence of her husband, sometime after the housebreaking, was seen dealing with part of the stolen things, when she made a statement importing a knowledge that they had been stolen. The Judge at the

trial declined to leave it to the jury to find whether the prisoner received the stolen property from her husband or in his absence.

Held, that the conviction could not be supported. *Reg. v. Wardroper*, 249

VARIANCE.

• See PERJURY (4).

VERDICT.

See INDICTMENT.

WAIVER.

See PERJURY (1), (3).

WOUNDING.

Three prisoners were indicted for feloniously cutting and wounding *E. R.*, with intent to do him grievous bodily harm. The jury found two of them guilty of the felony charged, and the third guilty of the misdemeanor of unlawfully wounding.

Semble, that the conviction was good under 14 & 15 *Vict. c. 19. s. 5.* *Reg. v. Cunningham*, 72

See JURISDICTION (1).

THE END.

